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ANTI-DISCRIMINATION PROVISION OF H.R. 3080

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ORIGINAL

ORIGINAL

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

AND

SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

COMPLETED

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H.R. 3080

ANTI-DISCRIMINATION PROVISION OF H.R. 3080

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CONTENTS

WITNESSES

Page

Alexander, Kathleen, vice president, of personal services, the Marriot Corp 70
  Prepared statement 74
Choate, Pat, director, policy analysis, TRW, representing the National Association of Manufacturers 70
  Prepared statement 88
de Bernado, Mark A., manager, labor law 70
Fleming, Arthur F., former Chairman, U.S. Commission on Civil Rights 110
  Prepared statement 132
Garcia, Hon. Robert, Representative in Congress from the State of New York 110
  Prepared statement 123
Grossman, Paul, esq 208
  Prepared statement 212
Keatinge, Richard H., chairman, American Bar Association 110
  Prepared statement 157
Pendleton, Clarence M., Jr., chairman, U.S. Commission on Civil Rights 4
  Prepared statement and testimony 9
Reyes, Benjamin, deputy mayor, city of Chicago 110
Reynolds, William Bradford, Assistant Attorney General, Civil Rights Division, Department of Justice 184
  Prepared statement 187
Spigelmyer, Sharon, Director, Human Resources and Equal Opportunity 70
Troy, James, Director of the Office of Program Operations, Equal Employment Opportunity Commission 4
  Prepared statement 26

ADDITIONAL MATERIAL

Opening statement from Hon. Alan K. Simpson, Senator from the State of Wyoming 2
Statement of Clarence Thomas, Chairman of the Equal Employment Opportunity Commission 32
Article from the Federal Register on "Guidelines on Discrimination Because of National Origin," dated Monday, December 29, 1980 40
Article on section 622, Citizenship, Residency Requirements, and Undocumented Workers 47
Statement of Hon. Harold Washington, mayor, city of Chicago 114
Newspaper article on Dragnet for Illegal Workers, dated May 10, 1982 152
Newspaper article on Some Employers Weed Out Illegal Aliens from the LA Times, dated June 19, 1984 153
Examples of alienage discrimination 167
Article taken from the Congressional Record, dated September 13, 1985 167
Letter to Hon. Alan K. Simpson, U.S. Senator, from Clarence M. Pendleton, Jr., Chairman, U.S. Commission on Civil Rights, dated October 9, 1985 168

APPENDIX

Questions submitted by subcommittees for the record and responses, sanctions structure and discrimination 235
Letter to Hon. Romano L. Mazzoli, chairman, Subcommittee on Immigration, Refugees, and International Law from Clarence M. Pendleton, Jr., dated November 13, 1985, with enclosures 247

Page
Letter to Hon. Romano L. Mazzoli, chairman, from Phyllis Berry, dated January 8, 1986, with enclosures 255
Letter to Hon. Romano L. Mazzoli, chairman, from Benjamin Reyes, dated November 6, 1985, with enclosures 264
Immigration responses to Senator Simpson's questions by Pat Choate 270
Answers to questions on immigration reform by Pat Choate 270
Letter to Skip Endress, from Terri A. Steinhaus, dated January 7, 1986, with attachments 279
Letter to Hon. Romano L. Mazzoli, chairman, from Paul Grossman, dated October 21, 1985, on response to follow-up questions 317
Letter to Hon. Romano L. Mazzoli, chairman, from William Bradford Reynolds, dated December 17, 1985, answers to subcommittee's questions 331
Statement of Hon. John Conyers, Jr., Member of the House of Representatives from the State of Michigan 342
Statement of Reverend Nicholas DiMarzio, executive director, Migration and Refugee Services 345
Letter to Hon. Romano L. Mazzoli, chairman, from Samuel L. Maury with enclosures from the business roundtable's employment policy task force 354
Statement on discrimination related to employer sanctions, submitted by Raul Yzaguire, president, National Council on La Raza 357
Letter to Hon. Romano L. Mazzoli, chairman, from Ingrid A. Voorhees, associated director, Congressional Relations, dated September 27, 1985, with enclosures 367
Statement of Erich Park, executive director, Estonian Aid, Inc 375
Statement of the National Federation of Independent Business, dated October 23, 1985 381
Statement on Alienage Discrimination—H.R. 3080, on behalf of the United Farm Workers of American, AFL-CIO 389
Alienage discrimination in employment prepared by MALDEF staff with appendixes 391

ANTI-DISCRIMINATION PROVISION OF H.R. 3080

WEDNESDAY, OCTOBER 9, 1985

House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Refugees, and International Law and Senate Committee on the Judiciary, Subcommittee on Immigration and Refugee Policy,

Washington, DC.

The subcommittees met, pursuant to adjournment, at 8:07 a.m., in room 2226, Rayburn House Office Building, Hon. Romano L. Mazzoli (chairman of the House Subcommittee on Immigration, Refugees, and International Law) presiding.

Present: Representatives Mazzoli, Frank, Berman, Lungren, Schumer, Sensenbrenner, Bryant, and McCollum; and Senators Simpson, Simon, and Grassley.

Staff present: Arthur Endres, Jr., House chief counsel; Lynn Conway, House assistant counsel; Thomas M. Boyd, House associate counsel; Bernadette Maguire, House legislative assistant; Richard Day, Senate chief counsel; and Carl Hampe, Senate legislative assistant.

Mr. **Mazzoli**. The subcommittee will come to order.

Let me announce that we are very pleased to have our colleagues from the other body with us in this joint hearing today on the last of the 4 days of hearings we have on our bill. And the subject, of course, today will be all the antidiscrimination provisions which are in the various measures. My colleague and friend and I had the first of these joint hearings back in 1981. So this is kind of a continuation of a longstanding road show which I hope will eventually wend its way to nirvana and success in getting the bill passed. As I mentioned, the subject of today's hearings will be the antidiscrimination provisions, many of which are in the bill as a result of the amendment offered by the gentleman from Massachusetts, Mr. Frank.

In a moment I will yield for an opening statement to my colleague from Wyoming, but just for the moment, to make a few announcements: Because of the unexpected but now firm plans of the Prime Minister of Singapore to address a joint session of the Congress at 10, we will adjourn at 10 in respect to the Prime Minister, and we will then, if uncompleted, and it looks like we probably will not be able to finish our work, we will then resume sitting 10 minutes after the end of the Prime Minister's address and proceed through the day until we finish.

Mr. William Bradford Reynolds, the Assistant Attorney General, who would have normally been part of the first panel, is out of town and will not arrive in Washington until midday. So he will be coming to the Hill to appear but toward the end of our panelists.

I will now, at this point, yield to my friend from Wyoming for any statements he might have.

Senator SIMPSON. Thank you very much, Chairman Mazzoli. You said something about "from the other body." I feel like I'm from another body. We finished at 3:30 a.m. this morning, and I was able to dash to my toilette, sleep 2 hours, rise, come here to be here at 8 a.m. So, we're going to send you something that's—well I don't know what you'll do with it, but it's an interesting piece of machinery. I don't know what that will be, and we will vote on that today, I hope, before we have to do another one of those. It's good to see you and I see some of my colleagues there that we had a long conference with. Howard Berman, Barney Frank, it's good to see you this morning.

Now we come to a tough issue, at least one that seemed to grind things down when we were in the conference, and I'm pleased to participate here in the joint hearing on the antidiscrimination provisions. I appreciate very much the cooperation of you, Mr. Chairman, and Chairman Rodino as we move on with this issue.

The Senate has now passed another immigration bill. Nonetheless, the question of potential discrimination that might be caused by employer sanctions is an important issue that should be addressed by both Houses of Congress. And that's exactly what we've done. No subcommittee, in either body, has been quite so diligent in holding open hearings and open forum on all the possible ramifications of the proposed reform bill. I won't go into the list of hearings and the days and what you and I both participated in, joint hearings, 20 days in the Senate, consultations and on and on.

This is the sixth joint hearing, and I'm pleased to be here today. I think that it has to be said that the record will show, clearly, that there has been more than ample opportunity for any possible facet of the antidiscrimination issue to be aired or even to surface. We are on the issue of alienage discrimination, and it's a relative latecomer to the scene. It was not even an issue during all the years of study by the Select Commission on Immigration and Refugee Policy. There was no mention of it whatsoever on either floor in the 97th Congress. There were perhaps two or three comments at most made on each floor in the 98th Congress, and most of the references but in passing. Alienage discimination has become a good issue, a good horse to ride, only since the conference committee of 1 year ago.

I still remain a bit baffled as to exactly how employer sanctions could cause alienage discrimination, something that does not have anything to do with national origin. If we're to cause any other kind of discrimination, we have it in the Senate bill that it kicks over the entire legislation in 3 years. So I think that's a pretty good trigger device for those of us that really do believe if there's discrimination based on any other thing that's definable, then we will trash the whole operation. So certainly, reasonable people disagree over whether employer sanctions could cause national origin discrimination. I hope we can continue to clarify that through the day, and that every time somebody uses the terms interchangeably we correct them.

I believe that if the immigration bill only made it illegal to hire an illegal alien, and said nothing else, then perhaps there are some employers who might avoid hiring foreign looking or foreign sounding people. However, the immigration bill merely requests employers to check the existing documents of new employees, requires them then to apply that check in a nondiscriminatory fashion, to all new employees, and then gives the employer an affirmative defense against any alleged violation once a record of that check has been made. That's what it says. There is absolutely no incentive for any new form of national origin discrimination. In fact, the procedures provided by that bill should reduce any levels of current discrimination, because all potential employees would have a means of demonstrating work eligibility.

Mr. Chairman, I would just say that, and I think this is very important, that discrimination based on alienage is neutral in its impact on race and national origin. It could theoretically occur, and the best example is, an employer refuses, say, a Canadian citizen, a green card holder, a job and instead hires a United States citizen. There is no evidence of this presently happening today in other than anecdotal incidences, and I certainly fail to see how employer sanctions alone would encourage it. One of the preferred documents under the bill we described for employment verification is the current green card, which is issued to legal aliens; another is the U.S. passport. And we give the same credibility to both of those documents.

Well, that's what the bill says and I hope we can kind of stick with what the bill says and what it is we're trying to get to. I just have a great deal of difficulty in seeing why we should create a new civil rights cause of action based upon a form of discrimination which has not even proven to be a problem. If it had, we would have dealt with it, especially in this House, and in the Senate in years past. I hate to see us place civil rights legislation on an immigration bill which surely has enough baggage of its own to haul, and that's the way it always will be with this kind of thing.

The issue is joined because these are the same provisions that they tried to put on the civil rights legislation in 1964 and 1972, and they were rejected twice by the Congress. So now we're going to crank up a new antidiscrimination agency in the Justice Department. We already have the EEOC. There's not the time, there's not the need to establish that kind of new agency-sized national bureaucracy with regional offices all over America—with all the things that go with it: Encouragement of litigation, procedural conflicts, contradiction of the will of Congress in 1964 and 1972.

And so, I will have a number of questions on those particular issues, and I'll reserve my further comment until then. But meanwhile, thank you, Mr. Chairman, and thanks to Congressman Rodino, Congressman Ham Fish, and Congressman Lungren and Congressman Sensenbrenner and the other members of the subcommittee. I appreciate what you're all working toward and maybe we can get something. If we don't, we'll have a lot more discrimination than we've got right now.

Mr. MAZZOLI. I appreciate the gentleman's comments, and we'll now go to our panel.

The first panel is Mr. Clarence M. Pendleton, Jr., the Chairman of the U.S. Commission on Civil Rights, and Mr. James Troy, Director of Program Operations at the Equal Employment Opportunities Commission. Gentlemen, thank you very much for joining us, and especially at this very early hour. I think this dispels forever the notion that Federal employees are "slugabeds."

And so, Mr. Pendleton, we'll hear both the statements which you've prepared which will be made a part of the record, and you may be——

Mr. SENSENBRENNER. Reserving the right to object, Mr. Chairman, have all of these people filed 48 hours in advance? Because I will object to making a part of the record any statement that was not filed 48 hours in advance.

Mr. MAZZOLI. I'm pleased my friend from Wisconsin brought the point up, because we did make it very clear at the last meeting that statements would have to abide by the 48-hour rule, and I believe, if I can understand this hieroglyphic here, that all did. The two panelists here both reported their statements on October 4, which is well within that period.

Mr. SENSENBRENNER. I withdraw my reservation.

Mr. MAZZOLI. Yes, thank you.

The gentleman may proceed.

TESTIMONY OF CLARENCE M. PENDLETON, JR., CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS; AND JAMES TROY, DIRECTOR OF THE OFFICE OF PROGRAM OPERATIONS, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. PENDLETON. Thank you, Mr. Chairman, for commenting, I guess, on my own travel schedule—Chicago day before yesterday, University of Michigan last night, and here this morning, and back out this afternoon. I appreciate coming in between the budget and the Prime Minister of Singapore.

Mr. MAZZOLI. We're all being made to play second banana around this place.

Mr. PENDLETON. I understand. I just appreciate the inclusion.

Mr. Chairman and members of both subcommittees, I am pleased to appear today in response to the invitation that I testify on the antidiscrimination provisions of H.R. 3080. I will confine my remarks to portions of my prepared statement which merit emphasis.

I want to stress three questions. First is the important question of the Commission's role under H.R. 3080 and its ability to fulfill that role; second is whether Congress ought to create a new civil rights bureaucracy around a new protected class; and third is the question of whether Congress ought to create a new protected class.

The reconstituted Commission on Civil Rights has not adopted a position on the antidiscrimination provisions of H.R. 3080 or on immigration reform generally. I am, therefore, speaking on behalf of the Commission only to the extent that my remarks address the Commission's role in the proposed legislation.

Under H.R. 3080, the Commission would be required to monitor the implementation and enforcement of employer sanctions and investigate allegations of resulting discrimination against citizens or authorized aliens. In addition, it would be required to submit to the

Congress three reports at 18-month intervals describing the implementation and enforcement of the act, for the purpose of determining whether discrimination has resulted. It is unfortunate, given what appears to be a significant role that the Commission is intended to assume, that the bill provides insufficient guidance to the Commission to understand clearly the intent of Congress.

One line of questions is raised by the bill's charge that the Commission "shall investigate allegations" of discrimination. Is the Commission obligated to respond to anyone's allegations of discrimination or only the allegations of someone who is directly and adversely affected by an unfair immigration-related employment practice as defined in section 274B? And how must we respond? Is the Commission being directed to oversee the operations of the Office of Special Counsel, which is already directed to investigate allegations of discrimination?

H.R. 3080 also directs that the Commission shall monitor the implementation and enforcement of section 274A. This language needs to be clarified as well. The way in which the Commission has defined its monitoring function traditionally is that our Office of Federal Civil Rights Evaluation conducts a series of studies of specific Government programs and antidiscrimination efforts by the Federal Government.

A typical study is within the limited scope carried out by only a few employees on any one project. Is this the type of monitoring the bill intends? Or is a broader definition of monitoring meant to include the use of field agents and a large number of employees?

Another point with respect to the role of the Commission involves the requirement imposed by the bill that the Commission publish three reports at 18-month intervals for the purpose of determining whether a pattern of unlawful discrimination has resulted from the implementation and enforcement of section 274A. If the proposed legislation is passed in October of this year, our first report would be due in April 1987, the second in October 1988, and the third in April 1990. Issuance of the third report in 1990 is problemmatic, however, as the Commission is scheduled to terminate at the end of September 1989. Obviously, some amendment of the bill is necessary in this regard.

At current funding levels, the Commission will find itself unable to carry out the tasks assigned to us under H.R. 3080. The bill regarding the Commission's role is identical to the language in last year's House measure. At that time the Commission expressed its concern in letters from the Commission's staff director to Chairman Rodino and to Senator Simpson. While the Commission would do its best to undertake the broad responsibilities under the proposed legislation, it could not do so without severely straining its resources.

The Commission stated therein, and I quote:

> The Commission believes it is preferable that the Immigration Reform and Control Act not contain requirements for prescribed Commission activity unless the Congress provides substantial increases in funding for the Commission to discharge those required duties.

The Commission further stated in these letters,

> Absent a congressionally mandated role to monitor, investigate, and report on discrimination flowing from employer sanctions, the Commission would, of course, un-

dertake appropriate, though less comprehensive, program activity to seek to determine whether this new law causes discrimination. Such activity in the form of a hearing, a study or monitoring, would be more possible within the range of our current resources. Our position is entirely understandable when one considers the size of the Commission and its resources it could bring to bear on the task it is being asked to assume.

For fiscal year 1985 our budget is $12,869,000, and the Commission has a current total of 236 full-time employees. This must be contrasted with the size of an enforcement agency like the Equal Employment Opportunity Commission, which has a budget of $163,255,000 and 3,334 full-time employees for fiscal year 1985.

Mr. **MAZZOLI**. Let the record note that a wince passed the face of your colleague when you said that.

Mr. **PENDLETON**. Our point is simply that the Commission is too small, at present, to undertake a full-scale monitoring role with respect to the immigration legislation. Nor is it clear that a full-scale monitoring role by the Commission is needed. Under H.R. 3080, the responsibilities of the Commission overlap with those of the Office of Special Counsel and the President. Both the Special Counsel and the Commission are to investigate allegations of immigration-related employer discrimination, although the Special Counsel's duties in this regard are carefully described under the bill while the Commission's are not.

Moreover, both the President and the Commission are to transmit to the House and Senate Judiciary Committees at 18-month intervals three reports on the impact of employer sanctions on immigration-related employment discrimination. In addition, the issue of discrimination against aliens is not one with which the Commission has a great deal of experience. Our last relevant project was in 1980, and that concerned itself more with certain legal issues in connection with aliens than it did with monitoring the enforcement of immigration laws. In general, it is fair to characterize the Commission as more concerned with the identification and analysis of civil rights issues than with massive oversight efforts.

Another issue raised by the language of H.R. 3080 concerns an inconsistency among the provisions regarding the role of the Commission, the Special Counsel, and the President. Inasmuch as these provisions are in the bill to allay concerns that the employer sanctions will produce discrimination, one would expect consistency with respect to the kinds of discrimination each is to address. Yet the language is markedly different. The Commission is directed to investigate allegations of unlawful discrimination by race or nationality against U.S. citizens or permanent or temporary resident aliens who intend to become citizens. The President is directed to publish three reports describing discrimination against citizens and permanent resident alien members of minority groups. And the Office of Special Counsel is to investigate discrimination against any individual, whether citizen or permanent or temporary resident alien, with respect to hiring, or recruitment, or referral, for a fee because of national origin or citizenship status.

Why is the Commission directed to examine racial discrimination when the Special Counsel has not been so directed? Why is the Commission directed to investigate discrimination based on nationality, and the Special Counsel, discrimination based upon national origin? Why are the Commission's investigations of discrimination restricted to unlawful discrimination, while the reports by the President are not so circumscribed?

There is a substantial difference between discrimination and unlawful discrimination so far as aliens are concerned, since they do not enjoy the same measure of protection against employment discrimination as citizens.

Turning to the antidiscrimination provisions of H.R. 3080, I must speak on my own behalf but offer the following objections:

First is the question of the appropriateness of setting up a new administrative mechanism to handle employment discrimination claims. Government civil rights agencies already include the Commission on Civil Rights, the Justice Department's Civil Rights Division, the Equal Employment Opportunity Commission, the Department of Labor's Office of Federal Contract Compliance, the Architectural and Transportation Compliance Board, and the Department of Education's Office of Civil Rights. The proposed fiscal year 1986 budget outlays for these activities is $387.5 million, an increase of 18 percent over the total figure for 1980. Each State, in addition, has civil rights enforcement agencies, as do many cities. In my opinion, the creation of a separate mechanism to enforce discrimination complaints, particularly one to carry out responsibilities which in large measure have already been delegated by the Congress to the EEOC, would be a mistake. The EEOC now has responsibility under title VII to investigate and prosecute claims of employment discrimination based upon national origin. To address the problem of overlapping jurisdiction that would arise between EEOC and the Office of Special Counsel, H.R. 3080 provides that complaints of national origin discrimination cannot be filed concurrently in both forums. The question, however, of conflicting precedents between EEOC and the Office of Special Counsel is not addressed, nor is it specified whether a plaintiff is barred from pursuing a remedy in one forum if the result in the other forum has proven to be unsatisfactory. Those who advocate the creation of an Office of Special Counsel contend that EEOC cannot investigate the claims of employer discrimination based on national origin where the employer has fewer than 15 employees. The appropriate response, if national origin discrimination by small employers were truly to become a problem once employer sanctions were enacted, would be to amend title VII, preferably at a later date, to expand EEOC's national origin jurisdiction over these employees.

And my second difficulty with the antidiscrimination provisions of H.R. 3080 relates to the question of whether Congress ought to enact a Federal statutory cause of action based on alienage discrimination. Current Federal statutory and case law provides some measure of protection against discrimination based upon alienage. The Supreme Court has interpreted section 1981 of title 42 to prohibit employment discrimination based on race, and one Federal court of appeals has extended this interpretation to prohibit alienage discrimination as well.

Beyond this point, most Federal court cases addressing employment discrimination, based on alienage, have done so in the context of reviewing State statutes containing alienage-based classifications. The thrust of these cases, which I have detailed in my prepared statement, is that such statutes will trigger a court's strict scrutiny unless discrimination is based on a political function.

Mr. **Mazzoli**. Mr. Pendleton, if it's possible, could you——

Mr. **Pendleton**. I'm through. I'll just stop right here.

Mr. **Mazzoli**. Well, it's been an interesting statement, and we do want to be sure we have plenty of time for questions. Thank you very much.

[The complete statement of Mr. Pendleton follows:]

STATEMENT OF CLARENCE M. PENDLETON, JR.
CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS

SUMMARY

The prepared statement of Chairman Clarence M. Pendleton is composed of two main parts. Part one discusses the role of the Commission under H.R. 3080, and part two discusses the antidiscrimination provisions of the bill more generally. The Commission has not adopted a position on the antidiscrimination provisions. Only part one of the Chairman's statement, therefore, represents the views of the Commission.

The Commission believes that H.R. 3080 requires clarification in regard to the duties the Commission is to undertake. Issues include the bill's use of "nationality" rather than "national origin"; inconsistency in the kinds of discrimination to be addressed by the Commission, the Special Counsel, and the President; imprecise language regarding the Commission's duty to investigate allegations of discrimination and to monitor the enforcement and implementation of section 274A; lack of recognition that the bill assigns a reporting function to the Commission that exceeds the Commission's statutory existence; the need for a supplemental appropriation if the Commission is to carry out the responsibilities envisioned for it by the bill; the overlapping responsibilities assigned to the Commission, the Special Counsel, and the President which raise the question whether the Commission's role is necessary; and the appropriateness of assigning a full-scale monitoring responsibility to the Commission in view of its limited size.

The second part of the Chairman's testimony raises two main objections to the antidiscrimination provisions. The first is that a new administrative mechanism to handle employment discrimination claims is unnecessary. In this context, two points are made. First, the civil rights enforcement bureaucracy already in place appears adequate for purposes of H.R. 3080. Any inadequacies demonstrated once the employer sanctions are in place can be dealt with by amending Title VII at a later date. Second, H.R. 3080 does not address the issue of conflicting precedents between the Office of Special Counsel and the EEOC, nor does it address the issue whether a plaintiff is barred from pursuing remedies in one forum if the remedy obtained in the other forum has proven unsatisfactory.

The second main objection concerns the establishment of a new cause of action based on alienage discrimination. Section 1981 and case law already provide some protection. H.R. 3080 goes beyond these protections based on an assumption that alienage discrimination will be a problem. Civil rights laws should not be framed on the basis of an assumption but on the basis of a demonstrated need, particularly where they include the establishment of new administrative mechanisms, attorney's fees, and a new protected class.

TESTIMONY OF CLARENCE M. PENDLETON, JR.
CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS
BEFORE THE SENATE SUBCOMMITTEE
ON IMMIGRATION AND REFUGEES
AND
THE HOUSE SUBCOMMITTEE ON
IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW

October 9, 1985

Mr. Chairman, Members of both Subcommittees, I am pleased to appear here today in response to your invitation that I testify on the anti-discrimination provisions of H.R. 3080.

I should note at the outset of my testimony that the reconstituted Commission on Civil Rights has not adopted a position on the anti-discrimination provisions of H.R. 3080 or on immigration reform generally. I am, therefore, speaking on behalf of the Commission only to the extent that my remarks address the Commission's role in the proposed legislation. In this connection, I want to discuss this bill's lack of clarity in defining the Commission's role and the Commission's ability to fulfill that role.

H.R. 3080 assigns an important enforcement function to the Commission. Under section 402(b) of the bill, the Commission would be required to monitor the implementation and enforcement of the provisions of section 274A of the Immigration and Nationality Act, and to investigate allegations that the enforcement or implementation of that section has resulted in discrimination against citizens or aliens who are not unauthorized aliens. In addition, the Commission is required to submit three reports at eighteen-month intervals to the House and Senate Judiciary Committees, describing the implementation and enforcement of the Act for the purpose of determining whether implementation and enforcement of the Act have resulted in discrimination.

It is unfortunate, given what appears to be the significant role that the Commission is intended to assume, that the bill provides insufficient guidance to the Commission to understand clearly the intent of Congress. For example, when the bill states that the Commission shall investigate allegations of "unlawful discrimination by race or nationality against citizens of the United States or aliens who are not unauthorized aliens," what does the word "nationality" mean? Is it synonymous with the phrase "national origin" that is currently used in Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment or Title VIII of the Civil Rights Act of 1968 which prohibits discrimination in housing? While the phrase "national origin" is well-defined through court cases and other sources of authority, the term "nationality" is undefined in both civil rights case law and the bill itself.

For that matter, inasmuch as the provisions regarding the Commission, the Special Counsel, and the President are in the bill to allay concerns that the employer sanctions will produce discrimination, one would expect consistency with respect to the kinds of discrimination each is to address.

Yet the language in these provisions is markedly different. The Commission is directed by H.R. 3080 to investigate allegations that the employer sanctions have resulted in "unlawful discrimination by race or nationality" against U.S. citizens or permanent or temporary resident aliens intending to become citizens. The President is directed under the bill to publish three reports describing the impact of employer sanctions on "discrimination against citizen and permanent resident alien members of minority groups." And the Office of Special Counsel is to investigate discrimination "against any individual (whether a citizen or permanent or temporary resident alien) with respect to hiring, or recruitment or referral for a fee, because of national origin or citizenship status."

Why is the Commission directed to examine racial discrimination when the Special Counsel has not been so directed? Why is the Commission directed to investigate discrimination based on nationality and the Special Counsel, discrimination based on "national origin"? Why are the Commission's investigations of discrimination restricted to unlawful discrimination, while the reports by the President are not so circumscribed? There is a substantial difference between discrimination and unlawful discrimination so far as aliens are concerned, since they do not enjoy the same measure of protection as citizens against employment discrimination.

Further, the President is directed to publish reports on discrimination against "citizen and permanent resident alien members of minority groups." Is it not your intent that these reports also discuss discrimination against temporary resident aliens who evidence an intent to become citizens, a category that is included within the scope of investigations by the Special Counsel and the Commission? Any why does the phrase "minority groups" appear in the section detailing the President's duties and not in the sections detailing the responsibilities of the Commission or Special Counsel? Which minority groups are intended?

Another line of questions is raised by the bill's charge that the Commission "shall investigate allegations" of discrimination. Is the Commission obligated to respond to anyone's allegation of discrimination, or only the allegations of someone who is directly and adversely affected by an unfair immigration-related employment practice as defined in section 274B of the bill? And how must we respond? Is the Commission being directed to oversee the operations of the Office of the Special Counsel, which is also directed to investigate allegations of discrimination?

H.R. 3080 also directs that the Commission "shall monitor the implementation and enforcement" of section 274A. This language needs to be clarified, as well. The way in which the Commission has defined its monitoring function traditionally is that our Office of Federal Civil Rights Enforcement conducts a series of studies of specific government programs and anti-discrimination efforts by the Federal government. A typical study is one with a limited scope carried out by only a few employees on any one project. Is this the type of monitoring that the bill intends, or is a broader definition of monitoring meant that includes the use of field agents and a large number of employees?

A final point with respect to the role of the Commission involves the requirement imposed by the bill that the Commission publish three reports at eighteen-month intervals for the purpose of determining whether a pattern of unlawful discrimination has resulted from the implementation and enforcement of section 274A. If the proposed legislation is passed in October of this year, our first report would be due in April of 1987, the second in October of 1988, and the third in April of 1990. Issuance of the third report in April of 1990 may be problematic, however, as the Commission is scheduled to terminate at the end of September 1989. Obviously, some amendment of the bill is necessary in this regard.

Another point that I wish to make on behalf of the Commission is that we will find ourselves unable, at current funding levels, to carry out the tasks assigned to us under

H.R. 3080. The bill regarding the role of the Commission is identical to language in last year's House measure. At that time, the Commission expressed its concern in letters from the Commission's Staff Director to Chairman Rodino and to Senator Simpson that, while the Commission would do its best to undertake the broad responsibilities under the proposed legislation, it could not do so without severely straining its resources. The Commission stated therein:

> The Commission believes it is preferable that the Immigration Reform and Control Act not contain requirements for prescribed Commission activity unless Congress provides substantial increases in funding for the Commission to discharge the required duties.

The Commission further stated in these letters:

> Absent a congressionally mandated role to monitor, investigate and report on discrimination flowing from employer sanctions, the Commission would, of course, undertake appropriate, though less comprehensive, program activity to seek to determine whether this new law causes discrimination. Such activity, in the form of a hearing, a study or monitoring, would be more possible within the range of our current resources.

Our position is entirely understandable when one considers the size of the Commission and the resources it could bring to bear on the tasks it is being asked to assume. For fiscal year 1985, our budget is $12,869,000, and the Commission has a current total of 236 full-time employees. This must be contrasted with the size of an enforcement agency like the Equal Employment Opportunity Commission, which has a budget of

$163,655,000 and 3,034 full-time employees for fiscal year 1985. Our point is simply that the Commission is too small at present to undertake a full-scale monitoring role with respect to immigration legislation.

Nor is it clear that a full-scale monitoring role by the Commission is needed. Under H.R. 3080, the responsibilities the Commission is directed to undertake overlap with those of the Office of Special Counsel and the President. Hence both the Special Counsel and the Commission are to investigate allegations of immigration-related employer discrimination, although the Special Counsel's duties in this regard are carefully described under the bill while the Commission's are not. Moreover, both the President and the Commission are to transmit to the House and Senate Judiciary Committees, at eighteen-month intervals, three reports on the impact of employer sanctions on immigration-related employment discrimination.

In addition, the issue of discrimination against aliens is not one with which the Commission has a great deal of experience. Our last relevant project was in 1980, and that concerned itself more with certain legal issues in connection with aliens than it did with monitoring the enforcement of immigration laws. In general, it is fair to characterize the Commission as more concerned with the identification and analysis of civil rights issues than with massive oversight efforts.

The fact that the Commission is unaccustomed to the role that would be thrust upon it by this bill is exacerbated by the numerous uncertainties surrounding the immigration issue. A National Research Council report entitled "Immigration Statistics: A Story of Neglect" concluded this year that government agencies do not produce the data that "we need to answer the fundamental policy issues of the day" (p. 5).

In the absence of meaningful data with respect to the contours of the immigration problem, it is difficult for the Commission to estimate the amount by which our budget would need to be increased to meet the demands placed on us by H.R. 3080. We believe it curious, however, that last year the House Judiciary Committee did not authorize additional funds for the Commission to carry out monitoring, investigating, and reporting activities identical to that which are asked of the Commission this year. Yet the Committee authorized $6 million for each of three years for the activities of a task force which, under the language of last year's bill, were substantially the same as the Commission's. This year, we ask that additional funding for the Commission be authorized if the language regarding the Commission remains the same. The figure authorized for the task force last year may provide a beginning point in your deliberations. We would, of course, be glad to work with you on this task.

Turning to the anti-discrimination provisions of H.R. 3080, I must speak on my own behalf, but offer the following objections.

First is the question of the appropriateness of setting up a new administrative mechanism to handle employment discrimination claims. Government civil rights agencies already include the Commission on Civil Rights, the Justice Department's Civil Rights Division, the Equal Employment Opportunity Commission, the Department of Labor's Office of Federal Contract Compliance Programs, and the Department of Education's Office for Civil Rights. Each state, in addition, has civil rights enforcement agencies, as do many major cities. In my opinion, creation of a separate mechanism to enforce discrimination claims, particularly one to carry out responsibilities which in large measure have already been delegated by Congress to the EEOC, would be a mistake.

The EEOC now has the responsibility under Title VII to investigate and prosecute claims of employment discrimination based on national origin. To address the problem of the overlapping jurisdiction that would arise between the EEOC and the Office of Special Counsel, H.R. 3080 provides that complaints of national origin discrimination cannot be filed concurrently in both forums. The question, however, of conflicting precedents between the EEOC and the Office of Special Counsel is not addressed, nor is it specified whether a plaintiff is barred from pursuing a remedy in one forum if the result in the other forum has proven unsatisfactory.

Those who advocate the creation of an Office of Special Counsel contend that EEOC cannot investigate claims of employer discrimination based on national origin where the employer has fewer than 15 employees. The appropriate response, if national origin discrimination by small employers were truly to become a problem once employer sanctions were enacted, would be to amend Title VII, preferably at a later date, to expand the EEOC's national origin jurisdiction over these employers.

My second difficulty with the anti-discrimination provisions of H.R. 3080 relates to the question whether Congress ought to enact a Federal statutory cause of action based on alienage discrimination. Current Federal statutory and case law provides some measure of protection against discrimination based on alienage. Section 1981 of Title 42 of the U.S. Code states, in relevant part, that "all persons ... have the same right ... to make and enforce contracts ... as ... white citizens." The Supreme Court has interpreted this to include private employment discrimination based on race, and one Federal court of appeals has extended the Court's interpretation of section 1981 to prohibit alienage discrimination as well.

But beyond this, most Federal court cases addressing employment discrimination based on alienage have done so in the context of reviewing state statutes containing alienage-based classifications. The thrust of these cases is that such statutes will trigger a court's strict scrutiny unless the discrimination is based on a "political function."

To highlight some of these cases, in 1973 the Supreme Court struck down a New York statute which barred aliens from employment in the state civil service (Sugarman v. Dougall); and invalidated a Connecticut State bar requirement that all bar examination applicants be U.S. citizens (In re Griffiths). In 1976, the Court invalidated a Puerto Rican law which prohibited aliens from practicing civil engineering privately (Examining Board v. Flores de Otero).

But two years later, the Court upheld a New York statute that required that state police officers be citizens (Foley v. Cornelie), and declined to invalidate a statute of that state which prohibited non-citizen elementary and secondary school teachers from teaching in the state educational system (Ambach v. Norwick). In 1982, the Court upheld a California law requiring that state peace officers be citizens against a challenge brought by an alien applying to be a California probation officer (Cabell v. Chavez-Salido). Finally, in 1984 the Court applied strict scrutiny to a Texas statute which required that notary publics be U.S. citizens. The Court found that the statute affected a lawful economic interest inasmuch as the function of a notary public was not an essential part of the political community (Bernal v. Fainter).

Legal aliens therefore enjoy some measure of constitutional protection when it comes to the issue of public employment, and I support application of the strict scrutiny standard to alienage-based statutory classifications provided the "political function" exception does not come into play.

But I oppose creation of a new cause of action for alienage discrimination in private employment. I oppose it as set forth in H.R. 3080 because it is based on an assumption that alienage discrimination will be a problem once employer sanctions are enacted. If we are to create a new protected class, we ought first to determine that such protection is necessary and, if necessary, whether the protection could not be provided simply by amending Title VII to include alienage. That could be done by enacting the employer sanctions, and permitting time to determine whether alienage discrimination does in fact occur because of those sanctions. But to create a new cause of action based on alienage discrimination complete with a separate enforcement mechanism and the provision for attorney's fees would, absent a demonstrated need, be the wrong way to shape our national civil rights policy.

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

CLARENCE M. PENDLETON JR.

Clarence M. Pendleton Jr. was appointed chairman of the newly constituted U.S. Commission on Civil Rights in December 1983. A Republican, he was appointed by President Reagan to serve a six-year term.

Mr. Pendleton was chairman of the old Civil Rights Commission during 1982-83. He served as president of the Urban League of San Diego from 1975 until 1982. Prior to 1975, he was director of the Model Cities Department of the city of San Diego; director of urban affairs for the National Recreation and Park Association, Washington, D.C. from 1970-72; recreation coordinator for the city of Baltimore Model Cities Agency from 1968-70; and instructor in physical education and recreation and swimming coach at Howard University, 1958-68.

Mr. Pendleton is currently president of Pendleton and Associates, a business development and investment firm and chairman and president of the San Diego County Development Corporation.

Mr. Pendleton is a trustee of the Scripps Clinic and Research Foundation, serves on the boards of the Greater American Federal Savings and Loan Association and the San Diego Coalition for Economic and Environmental Balance. He is also involved in a variety of civic, community and governmental affairs. He is a member of the Committee for Areawide Involvement in Redevelopment, Center City Development Corporation; serves on the San Diego Holiday Bowl Charity Committee and is a member of the Alpha Phi Alpha Fraternity.

Born in Louisville, Ky. on Nov. 10, 1930, Mr. Pendleton was raised in Washington, D.C. where he graduated from Dunbar High School. He attended Howard University in Washington, D.C. and earned a bachelor of science degree in 1954 and a master of arts degree in 1962.

Mr. Pendleton resides in San Diego, Calif. with his wife, Margrit and daughter Paula. He has two children from a previous marriage, George and Susan, who reside in Washington, D.C.

3/12/85

Mr. Mazzoli. Mr. Troy.

Mr. Troy. Thank you, Mr. Chairman. I, like my colleague here, appreciate the early hour. That means I have a longer time to do the job that a Federal employee has to do today.

Mr. Mazzoli. You're a diplomat in addition to your other duties.

Mr. Troy. I am Director of the Office of Program Operations for the Equal Employment Opportunity Commission. The Office of Program Operations has managerial responsibility for our 48 field offices, which process employment discrimination charges filed against private and public employers, labor organizations, and employment agencies.

The Chairman of the Commission, Clarence Thomas, has already submitted comments on the nondiscrimination provisions contained in the Immigration Control and Legalization Amendments Act of 1985 or H.R. 3080. Therefore, my comments this morning, based on the reason I was told I was invited, is to cover EEOC's operations—how our process works, and our agency workload. My testimony is also with the view that the more you know about the EEOC, and how the agency investigates charges, the better you'll be able to assess the impact of H.R. 3080 on the enforcement of fair employment laws.

Let me first briefly describe the Commission workload. The Commission is responsible for enforcing three fair employment statutes: Title VII of the Civil Rights Act of 1964 as amended, the Age Discrimination and Employment Act of 1967 as amended, and the Equal Pay Act of 1963. Under these statutes EEOC investigates charges of alleged employment discrimination based on denial of equal pay, age, race, color, religion, sex, and especially relevant to today's discussion, national origin. The agency currently has 3,000 employees, not 3,400 as my colleague said, 2,300 of which are in our field offices. Title VII of the Civil Rights Act of 1964 prohibits employers, except in very limited circumstances, from taking any employment action based on race, color, religion, national origin, and sex. Title VII's prohibition extends to employment decisions involving hiring, promotion, termination, and any other term or condition of employment. Approximately 80 percent of our charges are filed under title VII of the Civil Rights Act.

The Age Discrimination and Employment Act prohibits employers from taking age into account when making employment decisions. About 17 percent of our workload falls under this statute. Approximately 1 percent of our workload is filed under the Equal Pay Act.

The Commission receives approximately 55,000 to 70,000 charges to process, for us to process, each year. As I mentioned earlier, title VII constitutes the bulk of our work. In 1984 we received 51,000 title VII charges. In 1985 we expect to receive, since we have not counted our numbers yet, 57,000 title VII charges. In the first half of this decade, the number of claims alleging national origin discrimination has remained somewhat constant. Allegations of discrimination based on national origin constituted between 8.3 and 8.5 percent of all claims filed annually between fiscal years 1981 and 1984.

The most frequently filed charge under title VII involves the issue of discharge. By that I mean individuals are more apt to file a discriminatory dismissal than the issue of hiring or promotion discrimination. Consistent with this pattern, national origin charges raise the issue of discharge more than any other issue when a national origin charge has been filed.

At this point let me return to the charge process. Our involvement in the equal employment discrimination dispute is usually initiated by an individual who believes that a negative employment action affected him or her because of one of the factors mentioned above. The Commission also accepts charges filed by large organizations, labor organizations and civil rights groups, and commissioners of EEOC themselves can bring a charge.

Typically, however, an employee or applicant for employment calls, walks in or writes one of our offices, which are located throughout the country and the large metropolitan areas. Once that happens, a Commission staffer is assigned to take their charge. This person interviews the prospective charging party, obtains specific information, counsels the prospective charging party on types of claims recognizable under the three statutes we enforce. The individual is informed about jurisdictional threshholds such as the minimum number of employees an employer must have to be covered by the act, and how the overall Commission process works. If the individual decides to pursue his or her claim, they sign a charge form. A copy of the charge is sent to the respondent within 10 days of the charge being signed. After it's been received by EEOC, our field office's first decision is whether to retain the charge for our process or whether to defer the charge to a State of local agency.

Pursuant to section 706 of title VII, State and local fair employment practices agencies are given the first opportunity to process charges. The decision to retain the charge or to defer it depends upon whether or not they have a State or local agency in the jurisdiction where the charge has been filed, and whether or not that State or local agency has a State law or a municipal ordinance which allows them to provide complete relief to the charging party.

When the field office determines that it will investigate the case, we assign to charge to an Equal Opportunity Specialist, who is an impartial investigator. The EOS' investigation is guided by the facts in the charge. Thus, if a charging party alleges a racially motivated discharge, the Commissioner will not ordinarily investigate under any other basis. In other words, staff would not expand the scope of investigation beyond the plain reading of the charge unless information is developed during the investigation which suggests additional violations.

A primary Commission investigative tool is witness interview. The EOS interviews the charging party and others suggested by the charging party at the outset of the investigation. During the investigation of most charges, the EOS will also issue a request for information to the respondent. This request, similar to a legal interrogatory, is for information which is in the respondent's possession. A respondent will usually have 15 to 30 days to produce the information requested. The Commission may subpoena the information if the respondent refuses to respond in a timely manner.

The EOS may also request a company or labor organization to submit a respondent's position statement. A position statement allows the respondent to state in one comprehensive document their side of the story. Typically, the respondent will state what occurred, his motivation for the particular employment decision in question, and why this act was not discriminatory. The investigator may also interview witnesses named by respondent, on-site at respondent's facility, to corroborate or refute previously developed information.

After the EOS has collected and analyzed all of the relevant evidence, they draft a written determination. This decision states whether the EEOC has found reason to believe discrimination occurred, or whether or not we believe there is no cause to believe discrimination occurred. If the director of the field office issues a no-cause determination, that ends EEOC's involvement in the case. The charging party is then given a private right to bring civil suit. On the other hand, if EEOC issues a cause determination, it would then attempt to secure a conciliation agreement or settlement between parties.

The title VII statutory scheme requires EEOC to attempt informal settlement and conciliation between parties whenever we have made a finding of reasonable cause to believe discrimination occurred. Only after these informal attempts at achieving settlement have taken place, EEOC files suit in Federal court.

I stuck very closely to my prepared testimony. I'd be glad to answer any questions that the committee may have.

[The statements of Mr. Troy and Mr. Thomas follow:]

STATEMENT OF JAMES TROY, DIRECTOR
OF THE OFFICE OF PROGRAM OPERATIONS,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
FOR THE SUBCOMMITTEE ON IMMIGRATION,
REFUGEES, AND INTERNATIONAL LAW
OCTOBER 9, 1985

I AM JAMES H. TROY, THE DIRECTOR OF PROGRAM OPERATIONS, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. THE OFFICE OF PROGRAM OPERATIONS HAS MANAGERIAL RESPONSIBILITY FOR 48 FIELD OFFICES WHICH PROCESS EMPLOYMENT DISCRIMINATION CHARGES FILED AGAINST PRIVATE AND PUBLIC EMPLOYERS, LABOR ORGANIZATIONS AND EMPLOYMENT AGENCIES.

CLARENCE THOMAS, CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HAS ALREADY SUBMITTED COMMENTS ON THE NON-DISCRIMINATION PROVISIONS CONTAINED IN THE IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS ACT OF 1985, H.R. 3080. THEREFORE, MY COMMENTS THIS MORNING FOCUS ON EEOC'S OPERATIONS, I.E. HOW THE EEOC INVESTIGATES CHARGES OF EMPLOYMENT DISCRIMINATION AND THE AGENCY'S CURRENT WORKLOAD. MY TESTIMONY IS OFFERED WITH THE VIEW THAT THE MORE YOU KNOW ABOUT THIS COMMISSION, AND HOW THE AGENCY INVESTIGATES CHARGES, THE BETTER YOU WILL BE ABLE TO ASSESS THE IMPACT OF H.R. 3080 ON ENFORCEMENT OF FAIR EMPLOYMENT LAWS.

LET ME FIRST BRIEFLY DESCRIBE THE COMMISSION'S WORKLOAD. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IS RESPONSIBLE FOR ENFORCING three fair employment statutes, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Equal Pay Act of 1963. Under these statutes, EEOC investigates charges alleging employment discrimination based on age, race, color, religion, sex or especially relevant for today's discussion national origin. The Agency currently has approximately 3,000 employees, 2300 in our field offices.

Title VII of the 1964 Civil Rights Act prohibits employers, except in very limited circumstances, from taking any employment action based on race, color, sex, national origin or religion. Title VII's prohibition extends to employment decisions involving hiring, promotion, termination, or any other term or condition of employment. Approximately 80% of EEOC's workload involves charges filed under Title VII. The Age Discrimination in Employment Act prohibits employers, except in limited circumstances, from taking age into account when making employment decisions. About 17% of the Commission's workload involves age charges. Approximately 1% of our workload involves narrow complaints of sex-based equal pay violations--filed under the Equal Pay Act.

The Commission receives approximately 55,000 to 70,000 charges and complaints filed under these three statutes annually. As I mentioned earlier, Title VII constitutes the bulk of our workload. In FY-84, WE RECEIVED APPROXIMATELY 51,000 TITLE VII CHARGES. IN FY 1985 WE EXPECT TO HAVE RECEIVED APPROXIMATELY 57,000 TITLE VII CHARGES.

DURING THE FIRST HALF OF THIS DECADE, THE NUMBER OF CLAIMS ALLEGING NATIONAL ORIGIN DISCRIMINATION HAS REMAINED SOMEWHAT CONSTANT. ALLEGATIONS OF DISCRIMINATION BASED ON NATIONAL ORIGIN, CONSTITUTED BETWEEN 8.3% AND 8.5% OF ALL CLAIMS FILED ANNUALLY BETWEEN FISCAL 81 AND FISCAL 84.

THE MOST FREQUENTLY FILED CHARGE UNDER TITLE VII INVOLVES THE ISSUE OF DISCHARGE. BY THAT I MEAN, INDIVIDUALS ARE MORE APT TO ALLEGE A DISCRIMINATORY DISMISSAL THAN THE ISSUE OF HIRING OR PROMOTION DISCRIMINATION. CONSISTENT WITH THIS PATTERN, NATIONAL ORIGIN CHARGES RAISED THE ISSUE OF DISCHARGE MORE THAN ANY OTHER.

AT THIS POINT, LET ME RETURN TO THE CHARGE PROCESS.

THE INVOLVEMENT IN AN EMPLOYMENT DISCRIMINATION DISPUTE IS USUALLY INITIATED BY AN INDIVIDUAL WHO BELIEVES THAT A NEGATIVE EMPLOYMENT ACTION AFFECTED HIM OR HER BECAUSE OF ONE OF THE FACTORS MENTIONED ABOVE. THE COMMISSION ALSO ACCEPTS CHARGES FILED BY LABOR ORGANIZATIONS AND CIVIL RIGHTS GROUPS AND COMMISSIONERS THEMSELVES CAN INITIATE SYSTEMIC DISCRIMINATION OR PATTERN AND PRACTICE CHARGES. TYPICALLY, HOWEVER, AN EMPLOYEE OR APPLICANT FOR EMPLOYMENT VISITS, CALLS, OR WRITES ONE OF THE EEOC'S 48 FIELD OFFICES, WHICH ARE LOCATED THROUGHOUT THE COUNTRY IN THE LARGER EMPLOYMENT CENTERS.

IN A FIELD OFFICE, A COMMISSION STAFFER ASSIGNED TO AN INTAKE UNIT, INTERVIEWS THE PROSPECTIVE CHARGING PARTY, OBTAINING SPECIFIC INFORMATION, COUNSELLING THE PROSPECTIVE CHARGING PARTY ON TYPES OF CLAIMS WHICH ARE COGNIZABLE UNDER THE THREE STATUTES WHICH THE COMMISSION ENFORCES. THE INDIVIDUAL IS INFORMED ABOUT JURISDICTIONAL THRESHOLDS SUCH AS, THE MINIMUM NUMBER OF EMPLOYEES AN EMPLOYER MUST HAVE TO BE COVERED BY THE ACTS AND HOW THE OVERALL COMMISSION PROCESS WORKS.

IF AN INDIVIDUAL DECIDES TO PURSUE HIS OR HER CLAIM, THEY COMPLETE AND SIGN A CHARGE FORM. A COPY OF THE CHARGE WILL BE FORWARDED TO THE RESPONDENT (EMPLOYER) WITHIN 10 DAYS.

AFTER A CHARGE HAS BEEN RECEIVED BY EEOC, OUR FIELD STAFF'S FIRST DECISION IS WHETHER TO RETAIN THE CHARGE FOR AN EEOC INVESTIGATION OR "DEFER" IT TO A STATE OR LOCAL FAIR EMPLOYMENT AGENCY.

PURSUANT TO THE SECTION 706 OF TITLE VII, STATE AND LOCAL FAIR EMPLOYMENT AGENCIES ARE TO BE GIVEN THE FIRST OPPORTUNITY TO PROCESS CHARGES. THE DECISION TO RETAIN THE CHARGE OR DEFER IT DEPENDS UPON WHETHER THERE IS A STATE OR LOCAL AGENCY IN THE JURISDICTION

WHERE THE ALLEGED DISCRIMINATION OCCURRED, AND, IF SO, WHETHER THAT AGENCY UNDER STATE OR LOCAL LAWS CAN SECURE COMPLETE RELIEF FOR THE CHARGING PARTY.

WHEN THE FIELD OFFICE DETERMINES THAT IT WILL INVESTIGATE, THE CHARGE IS ASSIGNED TO AN EQUAL OPPORTUNITY SPECIALIST (EOS), WHO IS AN IMPARTIAL INVESTIGATOR. THE EOS'S INVESTIGATION IS GUIDED BY THE FACTS IN THE CHARGE. THUS, IF A CHARGING PARTY ALLEGES A RACIALLY MOTIVATED DISCHARGE, THE COMMISSION WILL NOT ORDINARILY INVESTIGATE UNDER ANY OTHER BASIS. IN OTHER WORDS, STAFF WILL NOT EXPAND THE SCOPE OF THE INVESTIGATION BEYOND A PLAIN READING OF THE CHARGE UNLESS INFORMATION SUGGESTS CLEAR ADDITIONAL VIOLATIONS.

A PRIMARY COMMISSION INVESTIGATIVE TOOL IS THE WITNESS INTERVIEW. THE EOS INTERVIEWS THE CHARGING PARTY AND OTHERS SUGGESTED BY THE CHARGING PARTY AT THE OUTSET OF THE INVESTIGATION.

DURING THE INVESTIGATION OF MOST CHARGES, THE EOS WILL ALSO ISSUE A REQUEST FOR INFORMATION TO THE RESPONDENT. THIS REQUEST, SIMILAR TO A LEGAL INTERROGATORY, IS FOR INFORMATION WHICH IS IN THE RESPONDENT'S POSSESSION.

A RESPONDENT WILL USUALLY HAVE 15 TO 30 DAYS TO PRODUCE THE INFORMATION REQUESTED. THE COMMISSION MAY SUBPOENA THE INFORMATION IF THE RESPONDENT REFUSES TO RESPOND IN A TIMELY MANNER.

An EOS may also request a company or labor organization to submit a Respondent's position statement. A position statement allows the Respondent to state in one comprehensive document their side of the story. Typically, the Respondent will state what occurred, its motivation for the particular employment decision in question, and why this act was not discriminatory. The investigator may also interview witnesses named by Respondent, on site at Respondent's facility, to corroborate or refute previously developed information.

After the EOS has collected and analyzed all the relevant evidence, they draft a written determination. The decision states whether the EEOC has found reason to believe discrimination occurred or no cause. If the Director of a field office issues a no cause determination that ends EEOC's involvement in the charge. The charging party is then given a private right to bring civil suit. On the other hand, if EEOC issues a cause determination, it will then attempt to secure a conciliation agreement or settlement between the parties. The Title VII statutory scheme requires EEOC to attempt informal settlement and conciliation between the parties whenever EEOC has made a finding of reasonable cause to believe discrimination occurred. Only after these informal attempts at achieving settlement have taken place, may EEOC file suit in Federal Court.

I will be happy to answer any questions which the Subcommittee may have regarding the EEOC's charge procedures.

STATEMENT OF CLARENCE THOMAS, CHAIRMAN
OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
FOR THE SUBCOMMITTEE ON IMMIGRATION, REFUGEES,
AND INTERNATIONAL LAW REGARDING H.R. 3080
TO AMEND THE IMMIGRATION AND NATIONALITY ACT

OCTOBER 9, 1985

THANK YOU FOR INVITING ME, AS CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TO COMMENT UPON THE ANTI-DISCRIMINATION PROVISIONS CONTAINED IN H.R. 3080. THE LEGISLATION PROPOSES TO AMEND THE IMMIGRATION AND NATIONALITY ACT TO REVISE AND REFORM THE IMMIGRATION LAWS. H.R. 3080 ALSO PROPOSES TO ENACT AN ALTERNATIVE ENFORCEMENT MECHANISM TO INVESTIGATE AND PROSECUTE ANY RESULTING EMPLOYMENT RELATED CHARGES OF DISCRIMINATION.

SIMILARLY, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) IS CHARGED WITH THE ENFORCEMENT OF THE CIVIL RIGHTS STATUTES, INCLUDING TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C 2000e _ET SEQ_. TITLE VII PROHIBITS EMPLOYMENT DISCRIMINATION ON THE BASIS OF RACE, COLOR, SEX, _NATIONAL ORIGIN_ AND RELIGION. TITLE VII APPLIES TO ANY CHARGE OF EMPLOYMENT DISCRIMINATION BY AN EMPLOYER OF FIFTEEN OR MORE PERSONS AGAINST ANY INDIVIDUAL ON THE BASIS OF THE INDIVIDUAL'S NATIONAL ORIGIN. THE TERM "NATIONAL ORIGIN" REFERS TO THE COUNTRY OF ORIGIN WHERE A PERSON WAS BORN OR, MORE BROADLY, THE COUNTRY FROM WHICH HIS OR HER ANCESTORS CAME. IT IS NOT RESTRICTED TO ANY ONE ETHNIC GROUPING.

FURTHER, TITLE VII, BY ITS TERMS, APPLIES TO ALL WORKERS AND APPLICANTS, WHETHER DOCUMENTED OR UNDOCUMENTED, EXCEPT AS PROVIDED IN SECTION 702, WHICH ADDRESSES THE EMPLOYMENT OF ALIENS OUTSIDE THE JURISDICTIONAL BOUNDARIES OF THE UNITED STATES. TITLE VII ALREADY MAKES IT UNLAWFUL FOR AN EMPLOYER TO DISCRIMINATE WITH REGARD TO THE HIRING, DISCHARGE, OR ANY TERMS AND CONDITIONS OF EMPLOYMENT ON THE BASIS OF NATIONAL ORIGIN. ADDITIONALLY, THE ACT HAS BEEN INTERPRETED BY THE SUPREME COURT AS ALLOWING THE AGGRIEVED INDIVIDUAL FULL "MAKE WHOLE" RELIEF AND BACKPAY FOR TWO YEARS PRIOR TO THE CHARGE FILING.

H.R. 3080 PROPOSES TO MAKE IT UNLAWFUL FOR A PERSON TO HIRE OR RECRUIT UNDOCUMENTED WORKERS KNOWING THAT THE WORKER IS AN "UNAUTHORIZED ALIEN" OR WITHOUT COMPLYING WITH THE VERIFICATION REQUIREMENTS OF THE BILL. THE LEGISLATION ALSO PROVIDES BOTH CIVIL AND CRIMINAL SANCTIONS FOR PERSONS WHO HAVE ENGAGED IN A PATTERN OR PRACTICE OF EMPLOYING UNDOCUMENTED WORKERS AND PROVIDES A CIVIL MONEY PENALTY FOR THE PAPERWORK VIOLATIONS. ADDITIONALLY, THE LEGISLATION WOULD ALLOW LIMITED LEGALIZATION FOR UNDOCUMENTED WORKERS CURRENTLY IN THIS COUNTRY, A SYSTEM FOR EXPANDING THE TEMPORARY FOREIGN AGRICULTURAL WORKER PROGRAM, ALONG WITH ITS BROAD ANTI-DISCRIMINATION PROVISIONS.

H.R. 3080, WOULD AMEND THE IMMIGRATION AND NATURALIZATION ACT TO ADD SECTION 274 B(b)(2), WHICH SPECIFICALLY STATES THAT THERE IS TO BE NO OVERLAP BETWEEN EEOC COMPLAINTS FILED UNDER TITLE VII AND THOSE SUBMITTED PURSUANT TO H.R. 3080. ADDITIONALLY, SECTION 101(e) OF H.R. 3080 PROVIDES:

> EXCEPT AS MAY BE SPECIFICALLY PROVIDED IN THIS SECTION, NOTHING IN THIS SECTION SHALL BE CONSTRUED TO RESTRICT THE AUTHORITY OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO INVESTIGATE ALLEGATIONS, . . . , AS PROVIDED IN SECTION 706 OF THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. 2000e-5), OR ANY OTHER AUTHORITY PROVIDED THEREIN.

AS OF THIS DATE, THE COMMISSION, AS A BODY, HAS NOT ADDRESSED THE RAMIFICATIONS OF H.R. 3080 OR S. 1200, A SIMILAR BILL WHICH WAS PASSED ON SEPTEMBER 19, 1985, BY THE SENATE.

HOWEVER, GIVEN THE CLARIFICATION OFFERED WITHIN H.R. 3080, I ANTICIPATE THAT, IF ENACTED, H.R. 3080 SHOULD HAVE A MINIMAL IMPACT ON THE EEOC'S AUTHORITY TO INVESTIGATE AND PROSECUTE COMPLAINTS. THEREFORE, I WILL CONFINE MY COMMENTS TO THOSE SECTIONS OF THE BILL WHICH MAY POSE TECHNICAL INCONSISTENCIES WITH TITLE VII.

EEOC STAFF HAS MADE THE FOLLOWING OBSERVATIONS:

1) TITLE VII, AS INTERPRETED BY THE SUPREME COURT IN ESPINOZA v. FARRAH MANUFACTURING CO., 414 U.S. 86 (1973), ALREADY PROVIDES COVERAGE WITH REGARD TO CLAIMS OF EMPLOYMENT DISCRIMINATION BECAUSE OF NATIONAL ORIGIN. FURTHER, THE EEOC ALREADY HAS AN ENFORCEMENT ORGANIZATION IN PLACE, WITH TWENTY-TWO DISTRICT OFFICES AND MORE THAN THREE THOUSAND EMPLOYEES, WHOSE MAIN FUNCTION IS TO INVESTIGATE THE EMPLOYMENT RELATED DISCRIMINATION CHARGES ON THE BASIS OF NATIONAL ORIGIN, RACE, SEX, RELIGION, COLOR, AND AGE.

2) TITLE VII APPLIES TO PRIVATE SECTOR EMPLOYERS WITH FIFTEEN OR MORE EMPLOYEES. H.R. 3080 WOULD EXTEND COVERAGE TO EMPLOYERS WITH FEWER THAN FIFTEEN EMPLOYEES, BUT ONLY WITH REGARD TO NATIONAL ORIGIN CLAIMS. THUS, THE SMALLER EMPLOYERS, THOSE WITH FOUR TO FOURTEEN EMPLOYEES, IRONICALLY COULD BE SUBJECT TO TOUGHER ENFORCEMENT PROCEDURES UNDER H.R. 3080 THAN ARE THE EMPLOYERS WITH MORE THAN FIFTEEN EMPLOYEES, WHO ARE SUBJECT TO TITLE VII.

3) EEOC REGULATIONS ADDRESS DISCRIMINATION ON THE BASIS OF CITIZENSHIP. ALTHOUGH TITLE VII DOES NOT MAKE IT UNLAWFUL FOR AN EMPLOYER TO DISCRIMINATE ON THE BASIS OF AN INDIVIDUAL'S CITIZENSHIP, THE COMMISSION, IN ITS GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN, 29 C.F.R. 1606.5 AND IN ITS COMPLIANCE MANUAL SECTION 622, "CITIZENSHIP, RESIDENCY REQUIREMENTS, ALIENS AND UNDOCUMENTED WORKERS" (COPY ATTACHED) HAS CONCLUDED THAT DISCRIMINATION AGAINST ANY INDIVIDUAL BECAUSE OF A LACK OF CITIZENSHIP, WHILE NOT PER SE DISCRIMINATION, MAY UNDER CERTAIN CIRCUMSTANCES, CONSTITUTE UNLAWFUL DISCRIMINATION BECAUSE OF NATIONAL ORIGIN WITHIN THE MEANING OF TITLE VII. SPECIFICALLY, IN THOSE CIRCUMSTANCES WHERE CITIZENSHIP REQUIREMENTS HAVE THE PURPOSE OR EFFECT OF DISCRIMINATING AGAINST AN INDIVIDUAL ON THE BASIS OF NATIONAL ORIGIN, THE IMPOSITION OF THE REQUIREMENTS WOULD BE PROHIBITED BY TITLE VII.

H.R. 3080, IF ENACTED, SIMILARLY WOULD PROHIBIT DISCRIMINATION ON THE BASIS OF "CITIZENSHIP OR ALIEN STATUS", IF THE PERSON CLAIMING DISCRIMINATION IS A U.S. CITIZEN OR "PERMANENT RESIDENT ALIEN, REFUGEE, ASYLEE, OR NEWLY LEGALIZED ALIEN WHO HAS FILED A NOTICE OF INTENT TO BECOME A U.S. CITIZEN." IT IS UNCLEAR HOW MUCH MORE PROTECTION WOULD BE AFFORDED UNDER H.R. 3080 THAN CURRENTLY IS PROVIDED UNDER EEOC'S INTERPRETATION OF TITLE VII.

4) IN FACT, IT IS POSSIBLE THAT H.R. 3080 MAY PROVIDE LESS NATIONAL ORIGIN PROTECTION THAN DOES TITLE VII. FOR EXAMPLE, H.R. 3080 PROVIDES A LIMITATION ON BACK PAY LIABILITY. UNDER H.R. 3080, BACK PAY LIABILITY MAY NOT ACCRUE FROM A DATE MORE THAN TWO YEARS PRIOR TO THE FILING OF A CHARGE WITH AN ADMINISTRATIVE LAW JUDGE. YET, THE INITIAL FILING OF THE CHARGE WOULD BE WITH THE SPECIAL COUNSEL. THE CHARGE MAY NEVER BE PRESENTED TO THE ADMINISTRATIVE LAW JUDGE, OR IT MAY BE YEARS BEFORE IT IS PRESENTED. TITLE VII, BY CONTRAST, ALLOWS BACK PAY FOR A PERIOD OF TWO YEARS PRIOR TO THE CHARGE FILING. ALSO, UNLIKE H.R. 3080, WHICH IS AIMED AT HIRING AND RECRUITMENT DISCRIMINATION ONLY, TITLE VII COVERS DISCHARGE, TERMS AND CONDITIONS OF EMPLOYMENT, WAGES AND ALL OTHER EMPLOYMENT RELATED BENEFITS AND PRIVILEGES. MOST OF THE NATIONAL ORIGIN CHARGES, WHICH THE COMMISSION RECEIVES, ALLEGE DISCRIMINATION IN DISCHARGE (TERMINATIONS) OR TERMS AND CONDITIONS OF EMPLOYMENT. THEREFORE, AS PROPOSED, THE ANTI-DISCRIMINATION PROVISIONS OF H.R. 3080 APPEAR TO BE UNNECESSARY.

5) H.R. 3080, AT SECTION 274B(c) CREATES AN OFFICE OF SPECIAL COUNSEL IN THE DEPARTMENT OF JUSTICE WITH THE RESPONSIBILITY "FOR [THE] INVESTIGATION OF CHARGES AND ISSUANCE OF COMPLAINTS UNDER THIS SECTION AND IN RESPECT TO THE PROSECUTION OF COMPLAINTS UNDER THIS SECTION. . ."

I HAVE BEEN TOLD THAT PROPONENTS IN FAVOR OF THE ESTABLISHMENT OF A SEPARATE "SPECIAL COUNSEL" OUTSIDE OF THE EEOC HAVE ARGUED THAT TITLE VII IS INADEQUATE BECAUSE:

1. TITLE VII, WHICH APPLIES TO EMPLOYERS OF FIFTEEN OR MORE PERSONS, WOULD NOT COVER THE SMALL BUSINESS AND SEASONAL EMPLOYERS, I.E. THOSE WITH FOUR TO FOURTEEN EMPLOYEES;
2. TITLE VII DOES NOT PROHIBIT DISCRIMINATION ON THE BASIS OF CITIZENSHIP;
3. SECTION 703(h) OF TITLE VII ALLOWS A "BONA FIDE OCCUPATIONAL QUALIFICATION" EXCEPTION AS A DEFENSE TO A NATIONAL ORIGIN CHARGE;
4. TITLE VII ALLOWS AN OTHERWISE DISCRIMINATORY BUSINESS PRACTICE WHICH MAY HAVE A DISCRIMINATORY IMPACT IF THE PRACTICE BEARS A REASONABLE BUSINESS RELATIONSHIP TO THE BUSINESS AND IS SUPPORTED BY BUSINESS NECESSITY;
5. A TITLE VII CHARGE IS VIEWED AS TOO DIFFICULT AND TIME CONSUMING TO PROCESS;

6. TITLE VII DOES NOT HAVE AN EXPEDITED ADMINISTRATIVE PROCESS FOR ADJUDICATING CLAIMS, SUCH AS CEASE AND DESIST AUTHORITY.

I WILL NOT ATTEMPT TO ARGUE THE PROCEDURAL POINTS WHICH HAVE BEEN RAISED. HOWEVER, IT WOULD SEEM THAT IF THERE ARE DEFICIENCIES WITHIN TITLE VII, THE SOLUTION IS TO STRENGHTEN TITLE VII, NOT CREATE ANOTHER AGENCY.

I HOPE THESE COMMENTS ARE HELPFUL IN ADDRESSING SOME OF THE CONCERNS WHICH HAVE BEEN SUGGESTED BY THE ANTIDISCRIMINATION PROVISIONS OF H.R. 3080, AS PROPOSED.

federal register

Monday
December 29, 1980

Part VI

Equal Employment Opportunity Commission

Guidelines on Discrimination Because of National Origin

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1606

Guidelines on Discrimination Because of National Origin

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final guidelines.

SUMMARY: The Equal Employment Opportunity Commission is revising its *Guidelines on Discrimination Because of National Origin* to clarify them and to specifically inform the public of unlawful employment practices which discriminate on the basis of national origin. These Guidelines reaffirm the Commission's position on national origin discrimination as expressed in Commission decisions and other legal interpretations.

EFFECTIVE DATE: December 29, 1980.

FOR FURTHER INFORMATION:
Karen Danart, Acting Director, or Raj K. Gupta, Supervisory Attorney, Office of Policy Implementation, 2401 E Street NW., Room 4002, Washington, D.C. 20506, (202) 634-7060.

SUPPLEMENTARY INFORMATION:

I. Background

On January 13, 1970, (35 FR 421) the Commission adopted its *Guidelines on Discrimination Because of National Origin*. These Guidelines were issued as a result of charges filed by individuals alleging denial of equal employment opportunity because their last names suggested association with certain national origin groups, or because of their association with persons, schools, churches and other lawful organizations identified with certain national origin groups. The Guidelines were last amended on March 18, 1974, to conform to the Supreme Court decision in *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86, 92 (1973).

In order to allow interested persons an opportunity to participate in all stages of its guideline process and in compliance with Executive Order 12044 (43 FR 12661, March 24, 1978, as amended by E.O. 12221, 45 FR 44249, July 1, 1980), the Commission noticed its intent to review these Guidelines (45 FR 51229 at 51231, August 1, 1980). On September 19, 1980, 45 FR 62728, the Commission published a proposed revision of its current Guidelines which appear at 29 CFR 1606. The proposed Guidelines were published for public comment for 60 days. In compliance with Executive Order 12160 (44 FR 44787, September 28, 1979) and with the Commission's Final Consumer Program, (45 FR 38930, June 9, 1980), the Commission notified members of the public of their opportunity to comment on the proposed Guidelines by directly mailing them to various interested groups and individuals.

These Guidelines are a significant regulation under Executive Order 12044, (43 FR 12661, Mar. 24, 1978, as amended by E.O. 12221, 45 FR 44249, July 1, 1980). The Commission has determined that they will not have a major impact on the economy and that a regulatory analysis is not necessary.

In compliance with Executive Order 12067, (43 FR 28967, July 5, 1978), the Commission has consulted with representatives from the necessary federal departments and agencies on the revision of these Guidelines.

II. An Overview of the Guidelines and Public Comments

The Commission's main purpose in revising its Guidelines is to restructure and clarify the preceding Guidelines, and to incorporate into the Guidelines the Commission's major interpretations of Title VII discrimination on the basis of national origin. Therefore, each section of the Guidelines is based on existing policy which the Commission has stated in its Decisions, in the preceding *Guidelines on Discrimination Because of National Origin* or in other interpretations of Title VII.

During the 60 day comment period, the Commission received approximately 250 comments from individuals, civil rights organizations, business associations, educational institutions, and public and private employers. About two-thirds of these comments were general statements, either in support of, or against the Guidelines, and did not contain specific substantive comments on the Guidelines. Many of these commentators, focussing only on the section relating to the speak-English-only rules, incorrectly equated the Guidelines with the bilingual education programs and other bilingual programs. The Commission wants to emphasize that the Guidelines have no relationship to the bilingual education programs or other bilingual programs. The Commission also wants to emphasize that the Guidelines do not promote or require bilingualism in the workplace. The goal of the Guidelines is to protect employees from discriminatory employment practices and to remove unnecessary barriers, such as the broad speak-English-only rules, which result in the denial of employment opportunities to individuals on the basis of their national origin.

Many commentators strongly supported this revision of the Guidelines and indicated that these Guidelines would be beneficial in achieving equal job opportunities for all individuals regardless of their national origin, or their cultural or linguistic characteristics.

The following is an analysis of each section, the major comments received and the changes made to the proposed Guidelines.

§ 1606.1—Definition of National Origin Discrimination

This section is based on § 1606.1(b) of the preceding *Guidelines on Discrimination Because of National Origin*. It defines national origin discrimination broadly as including, but not limited to, employment discrimination because of an individual's, or his or her ancestor's place of origin, or because of an individual's physical, cultural or linguistic characteristics. As a result of the comments, the Commission has added physical characteristics to this definition. As several commentators noted, physical characteristics, such as facial features, are often the most obvious bases for national origin discrimination.

The Commission will carefully examine charges involving the denial of equal employment opportunity because of an individual's name, marriage to a person of a national origin group, or association with persons, organizations, schools or religious institutions identified with any national origin group. Some commentators suggested that the definition was too broad in extending protection to an individual merely because he or she is married to someone of a certain national origin or associates with institutions identified with a certain national origin. These comments are based on a misreading of the section. The section only states that such charges will be examined with particular concern to determine if, indeed, the alleged discrimination was based on national origin. To clarify this misunderstanding, the Commission has added a sentence stating that it will determine whether there has been unlawful national origin discrimination by applying general Title VII principles, such as disparate treatment and adverse impact. For example, it would be unlawful national origin discrimination for an employer to disparately treat an employee who it thought belonged to a certain national origin group because the employee's spouse had a pronounced foreign appearance or a foreign name.

A few commentators stated that the definition of national origin discrimination was too broad because it not only included minorities but also all white persons. National origin discrimination may often overlap with discrimination because of race or color. The Commission's definition of national origin discrimination is necessarily broad because Title VII protects all individuals from national origin discrimination regardless of their race or color.

Some commentators believed that the definition does not recognize national origin discrimination grounded in a person's manner of dressing, such as, the wearing of turbans or saris. If the facts of a case show that, under general Title VII principles, there has been discrimination on the basis of national origin, such discrimination would be covered under the definitional phrase "cultural characteristics of a national origin group."

Several commentators correctly noted that for an individual to be protected against national origin or his ancestors have their origins in a sovereign nation. See, for example, *Roach* v. *Dresser Industries*, 23 FEP Cases 1073 (W.D. La. 1980), where the court held that a person of Acadian descent ("Cajun") could sue under Title VII for national origin discrimination. Because the phrase "country of origin" may imply a reference to a sovereign nation, it has been substituted by the phrase "place of origin".

Also, the phrase "particular national origin" in the proposed Guidelines has been changed to "national origin group" throughout this section. In order to have a claim of national origin discrimination under Title VII, it is not necessary to show that the alleged discriminator knew the *particular* national origin group to which the complainant belonged. To prove a national origin claim, it is enough to show that the complainant was treated differently than others because of his or her foreign accent, appearance or physical characteristics. See, for example, *Berke* v. *Ohio Department of Public Welfare*, 24 EPD ¶31,217 (6th Cir. 1980), which held that defendants had discriminated against Berke because of her accent which flowed from her national origin. The Court of Appeals, in a per curiam opinion, affirmed the unpublished district court opinion. The district court had held that it was immaterial that the employer could not have discriminated against the employee because she was of Polish origin; the employer did not know that the employee was Polish. It was sufficient that the employer treated her differently because she had a "foreign" accent.

§ 1606.2—Scope of Title VII Protection

The first sentence of this section is based on § 1606.1(c) of the preceding Guidelines, and has been revised to conform with the coverage of Title VII. Section 1606.2 also recognizes that Title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination.

One commentator suggested that the Commission clarify the responsibility of labor organizations regarding national origin discrimination. The last sentence has been restated to clarify that the Guidelines use the term "employer" to refer to all entities covered by Title VII. Therefore, the Guidelines apply to all entities covered by Title VII, including labor organizations, joint labor management committees controlling apprenticeship or other training or retraining, and public or private employment agencies.

§ 1606.3—The National Security Exception

Section 1606.3 is based on the exception in § 1606.1(d) of the preceding Guidelines. This Section recognizes the national security exception as it appears in Section 703(g) of Title VII.

The Commission did not receive any comments from the public on this section. However, as a result of interagency coordination under Executive Order 12067, a footnote has been added to refer to the national security provision for federal employment under 5 U.S.C. 7532.

§ 1606.4—The Bona Fide Occupational Qualification Exception

This section reiterates the last sentence in § 1606.1(a) of the preceding Guidelines and is based on the Commission's long held position that the bona fide occupational qualification exception under Section 703(e) of Title VII shall be strictly construed. Several commentators supported the Commission's strict construction of the BFOQ exception. There were no substantive comments on this section and no changes have been made.

§ 1606.5—Citizenship Requirements

This section is based on § 1606.1 (d) and (e) of the preceding Guidelines. In those circumstances where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII. See *Espinoza* v. *Farah Mfg. Co. Inc.*, 414 U.S. 86, 92 (1973).

Some commentators noted that the Guidelines do not indicate whether an employer would be liable under Title VII, if a State law prohibits the employment of illegal aliens and if the employer refuses to hire an "illegal alien" because of that State Law. The commentators mentioned twelve states which have laws prohibiting the employment of "illegal aliens". They also cited to the Supreme Court decision in *De Canas* v. *Bica*, 424 U.S. 351 (1976), which held that the State of California was not totally barred, by virtue of the Immigration and Nationality Act (INA), from regulating the employment of "illegal aliens" within its boundaries. However, the Court left the question open for the lower court to determine whether the California statute is too broad and therefore in conflict with the purposes and objectives of Congress in enacting the Immigration and Nationality Act. For example, the Court noted that the California statute prohibits the employment of aliens who are "not entitled to lawful residence in the United States"; and, that therefore, on its face, it appears to conflict with the INA which permits certain aliens, not entitled to lawful residence, to work in the United States. In *De Canas*, the Court was not presented with the issue of whether the California law was consistent with the purposes and objectives of Title VII. Similar analysis, however, would have to be made in determining whether a particular State law conflicts with Title VII. In Title VII, Congress only specifically excluded from coverage the employment of aliens outside the United States. See Section 702 of Title VII, 42 U.S.C. 2000e–1. Moreover, even if such a State law is found not to have been superseded under Section 708 of Title VII, 42 U.S.C. 2000e–7, as one of these commentators recognized, an employer may be liable under Title VII if it is shown that the employer treats applicants who look or speak like aliens differently than other applicants. Since the Commission has not been presented with charges involving respondent defenses based on such State laws, it has not developed policy in this area. If the Commission should receive such a charge, it will base its decision on the provisions of the State law involved and on the employer's application of the State law to its employment practices.

As a result of interagency coordination under Executive Order 12067, the Commission has added to footnote 2, a reference to Executive Order 11935, 5 CFR Part 7.4, and to 31 U.S.C. 699(b), which set forth citizenship requirements for certain types of Federal employment.

§ 1606.6—Selection Procedures

This section is derived from several of the concepts stated in § 1606.1(b) of the preceding Guidelines. As a result of the comments, this section has been revised. It affirms that in investigating selection procedures for adverse impact on the basis of national origin, the Commission will apply the principles of the *Uniform Guidelines on Employee Selection Procedures* (UGESP), 29 CFR Part 1607. As some commentators correctly noted, height and weight requirements are exceptions to the "bottom line" concept under Section 4C(2) of the UGESP. Section 1606.6(a)(2) now clearly states this. Some commentators also stated that the effect of § 1606.6(b) of the proposed Guidelines was to include fluency-in-English requirements and foreign training or education requirements as exceptions to the "bottom line" concept. Section 1606.6(b) now clarifies that the Commission does not consider these selection procedures to be exceptions to the "bottom line" concept. However, this section emphasizes that fluency-in-English and foreign training or education requirements are often the basis of national origin discrimination. Therefore, the Commission will carefully examine charges involving these requirements for evidence of discrimination under both the disparate treatment and adverse impact theories.

Some commentators were concerned with the lack of guidance on how to determine adverse impact and job relatedness for selection criteria identified in § 1606.6. They also wanted to know the recordkeeping requirements for national origin groups. The Commission has given detailed guidance in the UGESP on how to determine adverse impact and on validation. Proposed § 1606.6(a)(1) has been revised to clarify that these are the standards which employers should apply in evaluating selection procedures for unlawful national origin discrimination. The UGESP, sections 4 and 15, specify the national origin groups for which employers are required to keep records in evaluating selection procedures for unlawful national origin discrimination. Those recordkeeping requirements apply to all the selection procedures mentioned in § 1606.6.

Most of the comments on this section concerned the selection procedures mentioned in §1606.6(b)(2), *i.e.*, the denial of employment opportunities because of an individual's foreign accent or inability to communicate well in English. An employer who considers a person's foreign accent or ability to communicate in English as one of its criteria in selecting applicants for a job or other employment opportunities, should examine these practices for evidence of disparate treatment on the bases of national origin, as well as for evidence of adverse impact under the UGESP. If there is adverse impact based on national origin, the employer must justify the use of the selection procedure by showing that it is job related or otherwise justified under Federal law. For example, knowing how to speak English could be job related for the job of selling shoes to English-speaking customers. However, if the employer required its sales people to speak without an accent or to have a certain degree of fluency in English, and if these requirements had an adverse impact based on national origin, the employer would have to show the job relatedness of the no-foreign-accent requirement, or of the degree of fluency in English which it required.

Several commentators were concerned about the liability under Title VII of employers who require their employees to be bilingual for certain jobs. A job requirement of bilingualism is a selection procedure under the UGESP, and employers should follow the principles of the UGESP in analyzing these jobs for adverse impact on the basis of national origin.

Some commentators were concerned that the Guidelines would discourage employees from improving their ability to speak English. A few employers mentioned that they had programs for their employees from non-English speaking backgrounds to study and improve their English language skills. The Commission strongly supports such programs, and nothing in these Guidelines precludes employers from encouraging their employees to improve their ability to speak English. Simply stated, the Commission's concern is that individuals are not deprived of employment opportunities on the basis of non-job-related language proficiency requirements which under the UGESP have an adverse impact on the basis of national origin, or which are used to disparately treat individuals because of their national origin.

Some commentators stated that it would be difficult and impractical to evaluate foreign training and education, especially in the professional fields, and that in some instances, a state licensing requirement for the job may treat foreign education or training differently. It is noted that an individual's foreign training or education is particularly susceptible to subjecting the individual to employment discrimination on the basis of national origin. Therefore, charges alleging discrimination on this basis will be carefully examined by the Commission for national origin discrimination. The Commission's investigation will focus on such questions as: does the employer treat all foreign training or education on the same basis, or does it discriminate between foreign training or education on the basis of an individual's national origin; although a job may ordinarily require a state license, does the employer uniformly and always require such license for the job. (For licensing or certification requirements that have an adverse impact, *inter alia*, on the basis of national origin, see also Sections 2B and 16W of the UGESP, 29 CFR 1607.2B and 1607.16W; and UGESP Questions and Answers #7, 44 FR 11996, 11997 (March 2, 1979).

§ 1606.7—Speak-English-Only Rules

This section recognizes that an individual's primary language is often an essential national origin characteristic. According to estimates from the Survey of Income and Education conducted by the U.S. Bureau of Census in Spring 1976, approximately 28 million persons in the United States (about 13% of the total U.S. population) have non-English language backgrounds and may be affected by an employer's speak-English-only rule. The survey identifies persons with non-English language backgrounds as persons whose mother tongue is not English, who normally use languages other than English, or who live in households where languages other than English are spoken. About 21 million, or seventy five percent, of this group are above the age of 18. The study shows the following approximate numbers for each of these language backgrounds: Spanish, 10.6 million; Italian, 2.9 million; German, 2.7 million; French, 1.9 million; Chinese, Japanese, Korean and Vietnamese, 1.8 million; Polish, 1.5 million. Approximately 2.4 million persons in the United States do not speak any English at all.[*]

An employer's rule which requires employees to speak English at all times, including during their work breaks and lunch time, is one example of an employment practice which discriminates against persons whose primary language is not English.

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[*] See U.S. Department of Health, Education and Welfare, National Center for Education Statistics, Bulletin 78 B-5, August 22, 1978, "Geographic Distribution, Nativity, and Age Distribution of Language Minorities in the United States: Spring 1976". Waggoner, Dorothy, "Non-English Language Background Persons: Three U.S. Surveys", TESOL Quarterly, vol. 12, No. 3 at 247-262, September, 1978.

Under § 1606.7(a), the Commission presumes that totally prohibiting employees from speaking their primary language, violates Title VII because it is a burdensome term and condition of employment which discriminates on the basis of national origin by disadvantaging an individual's employment opportunities and by creating a discriminatory working environment. Therefore, where such a rule exists, the Commission will closely scrutinize it. However, § 1606.7(b) also recognizes that an employer may require its employees to speak only in English at certain times and that this would not be discriminatory if the employer shows that the rule is justified by business necessity; for example, where safety requires that all communications be in English so that everyone can closely follow a particular task, such as, surgery or drilling of oil wells;** or where a salesperson is attending to English-speaking customers. When the employer believes that the rule is justified by business necessity, the employer should clearly inform its employees of the general circumstances under which they are required to speak only in English and the consequences of violating the rule. Notice of the rule is necessary because it is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Any adverse employment decision against an individual based on a violation of the rule will be considered as evidence of discrimination when an employer has not given effective notice of the rule.

Most of the general, non-substantive comments were directed toward this section of the Guidelines. These comments reflected a misunderstanding of the Guidelines either by equating them with bilingual education and other bilingual programs or by concluding that their purpose is to promote bilingualism in the workplace. As we stated at the beginning of this analysis, the Guidelines are not concerned with bilingual education or other bilingual programs, and they do not promote bilingualism in the workplace. The purpose of the guidelines is to explain to employers, and other entities covered by Title VII, the Commission's interpretation of what constitutes national origin discrimination.

As the Court noted in *Garcia* v. *Gloor*, 618 F. 2d 264, 268 n.1 (5th Cir. 1980), the Commission's previous Guidelines did not give any standards for testing employer rules which prohibit the use of languages other than English. The purpose of § 1606.7 is to provide this guidance. The Commission's concern is to prevent employers from imposing speak-English-only rules, as arbitrary and oppressive terms and conditions of employment, on people who come from non-English-speaking backgrounds in order to deprive them of an equal employment opportunity for jobs they are otherwise fully qualified to perform. Section 1606.7 does not conflict with the *Gloor* decision. *Gloor* did not involve a speak-English-only rule which was applied at all times. Neither did the facts in *Gloor* involve a bilingual employee whose primary language was not English. In the Court's view, Mr. Garcia, who spoke both English and Spanish failed to prove that Spanish was his primary language.

Several commentators objected to the presumption in § 1606.7(a) that a speak-English-only rule which is applied at all times, including break and lunch time, violates Title VII. The Commission believes that this would create such a burdensome term and condition of employment, for employees whose primary language is not English, that the mere application of such a rule would shift the burden to the employer. Therefore, the Commission believes it is necessary to closely scrutinize such an absolute prohibition. However, employers may require that English be spoken when it is justified by business necessity.

Section 1606.7(a) has been restructured, and the phrase "in the workplace has been added. The words "narrowly drawn" have been eliminated in § 1606.7(b) because they are redundant.

Some commentators stated that to notify employees of the "exact circumstances and times" of speak-English-only rules would be impractical for employers to implement. Therefore, the Commission has changed the phrase, "exact circumstances and times" in § 1606.7(c), to the more flexible concept of "general circumstances." The manner in which an employer notifies its employees does not matter. However, the notice must be effective, *i.e.*, the employee should know under what circumstances he or she is required to speak only in English and what will happen if he or she violates the rule.

Section 1606.8—Harassment

This section states that harassment on the basis of national origin is a violation of Title VII and that an employer has an affirmative duty to maintain a working environment free from harassment on the basis of national origin. Section 1606.8(c) applies general Title VII principles to the issue of harassment and states that an employer is responsible for the acts of its supervisory employees or agents, regardless of whether the acts were authorized or forbidden by the employer and regardless of whether the employer knew or should have known of the acts. Section 1606.8(d) distinguishes the employer's responsibility for the acts of its agents or supervisors from the responsibility it has for conduct between fellow employees. This subsection states that liability for acts of national origin harassment in the workplace between fellow employees exists only when the employer, its agents or supervisory employees, knows or should have known of the conduct, and the employer cannot demonstrate that it took immediate and appropriate corrective action. Section 1606.8(e) recognizes that in certain circumstances, an employer may also be responsible for the acts of non-employees with respect to harassment of employees on the basis of national origin.

Some commentators objected to the strict liability of an employer under § 1606.8(c) for the acts of harassment of its supervisory employees or agents. Other commentators objected to an employer's responsibility for the conduct of non-employees as set forth in § 1606.8(e).

This Commission has not made any change in this section. The principles of this section are the same as stated in the recently published Commission's *Guidelines on Sexual Harassment*, 45 FR 74676 (November 10, 1980). These principles have been carefully developed by the Commission and fully commented upon in the supplementary information to the Commission's final *Guidelines on Sexual Harassment*, 45 FR 74676, 74677.

Date: December 22, 1980.

Eleanor Holmes Norton,

Chair, Equal Employment Opportunity Commission.

Accordingly, 29 CFR Chapter XIV is amended by revising Part 1606 to read as follows:

PART 1606—GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

Sec.
1606.1 Definition of national origin discrimination.
1606.2 Scope of Title VII protection.
1606.3 The national security exception.
1606.4 The bona fide occupational qualification exception.
1606.5 Citizenship requirements.
1606.6 Selection procedures.
1606.7 Speak-English-only rules.

** See for example *Saucedo* v. *Brothers Well Service, Inc.*, 464 F. Supp. 919 (S.D. Texas 1979).

1606.8 Harassment.

Authority: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq.

§ 1606.1 Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general Title VII principles, such as disparate treatment and adverse impact.

§ 1606.2 Scope of Title VII protection.

Title VII of the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin. The Title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination. These Guidelines apply to all entities covered by Title VII (collectively referred to as "employer").

§ 1606.3 The national security exception.

It is not an unlawful employment practice to deny employment opportunities to any individual who does not fulfill the national security requirements stated in Section 703(g) of Title VII.[1]

§ 1606.4 The bona fide occupational qualification exception.

The exception stated in Section 703(e) of Title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed.

§ 1606.5 Citizenship requirements.

(a) In those circumstances, where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII.[2]

(b) Some State laws prohibit the employment of non-citizens. Where these laws are in conflict with Title VII, they are superseded under Section 708 of the Title.

§ 1606.6 Selection procedures.

(a)(1) In investigating an employer's selection procedures (including those identified below) for adverse impact on the basis of national origin, the Commission will apply the *Uniform Guidelines on Employee Selection Procedures* (UGESP), 29 CFR part 1607. Employers and other users of selection procedures should refer to the UGESP for guidance on matters, such as adverse impact, validation and recordkeeping requirements for national origin groups.

(2) Because height or weight requirements tend to exclude individuals on the basis of national origin,[3] the user is expected to evaluate these selection procedures for adverse impact, regardless of whether the total selection process has an adverse impact based on national origin. Therefore, height or weight requirements are identified here, as they are in the UGESP,[4] as exceptions to the "bottom line" concept.

(b) The Commission has found that the use of the following selection procedures may be discriminatory on the basis of national origin. Therefore, it will carefully investigate charges involving these selection procedures for both disparate treatment and adverse impact on the basis of national origin. However, the Commission does not consider these to be exceptions to the "bottom line" concept:

(1) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent,[5] or inability to communicate well in English.[6]

(2) Training or education requirements which deny employment opportunities to an individual because of his or her foreign training or education, or which require an individual to be foreign trained or educated.

§ 1606.7 Speak-English-only rules.

(a) *When Applied at all Times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.[7] Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.

(b) *When Applied Only at Certain Times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) *Notice of the Rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

§ 1606.8 Harassment.

(a) The Commission has consistently held that harassment on the basis of national origin is a violation of Title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin.[8]

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[1] See also, 5 U.S.C. 7532, for the authority of the head of a federal agency or department to suspend or remove an employee on grounds of national security.

[2] See *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 92 (1973). See also, E.O. 11935, 5 CFR Part 7.4, and 31 U.S.C. 699(b), for citizenship requirements in certain Federal employment.

[3] See CD 71-1529 (1971), CCH EEOC Decisions ¶6231, 3 FEP Cases 952; CD 71-1418 (1971), CCH EEOC Decisions ¶6223, 3 FEP Cases 580; CD 74-25 (1973), CCH EEOC Decisions ¶6400, 10 FEP Cases 260; *Davis v. County of Los Angeles*, 566 F. 2d 1334, 1341-42 (9th Cir., 1977) vacated and remanded as moot on other grounds, 440 U.S. 625 (1979). See also, *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

[4] See Section 4C(2) of the *Uniform Guidelines on Employee Selection Procedures*, 29 CFR 1607.4C(2).

[5] See CD AL68-1-155E (1968), CCH EEOC Decisions ¶6008, 1 FEP Cases 921.

[6] See CD YAU9-048 (1969), CCH EEOC Decisions ¶6054, 2 FEP Cases 78.

[7] See CD 71-446 (1970), CCH EEOC Decisions ¶6173, 2 FEP Cases 1127; CD 72-0281 (1971), CCH EEOC Decisions ¶6293.

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

(c) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of national origin regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of harassment in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

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[8] See CD CL68-12-431 EU (1968), CCH EEOC Decisions ¶6085, 2 FEP Cases 295; CD 72-0621 (1971), CCH EEOC Decisions ¶6311, 4 FEP Cases 312; CD 72-1561 (1972), CCH EEOC Decisions ¶6354, 4 FEP Cases 852; CD 74-05 (1973), CCH EEOC Decisions ¶6387, 6 FEP Cases 834; CD 76-41 (1975), CCH EEOC Decisions ¶6632. See also, Amendment to *Guidelines on Discrimination Because of Sex*, § 1604.11(a) n. 1, 45 FR 74676 at 74677 (November 10, 1980).

SECTION 622
CITIZENSHIP, RESIDENCY REQUIREMENTS, ALIENS AND UNDOCUMENTED WORKERS

622.1 Introduction - Discrimination against any individual because of lack of citizenship, although not *per se* discriminatory, may, under certain circumstances, constitute unlawful discrimination because of national origin within the meaning of Title VII of the Civil Rights of 1964, as amended. This section provides guidance on charges filed against private and public employers which raise issues such as citizenship, residency requirements, and applicability of the statute to aliens and undocumented workers.

622.2 Guidelines on Citizenship Requirements for Employment Other Than Federal - The Commission's Guidelines on Discrimination Because of National Origin, 29 C.F.R. §1606.5(a) and (b) provide as follows:

> (a) In those circumstances where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII.
>
> (b) Some state laws prohibit the employment of noncitizens. Where these laws are in conflict with Title VII, they are superseded under Section 708 of the Title.

(a) Purpose and Effect - The "purpose and effect" section of the Commission's guidelines was adopted pursuant to the Supreme Court's holding in Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), discussed in §622.2(c), below. To determine whether an employer's citizenship requirement has the purpose or effect of discriminating on the basis of national origin, the following information should be obtained:

(1) Percentage of charging party's national origin group in the labor force for the SMSA where the charge is filed;

(2) Percentage of respondent's workforce which is composed of individuals of charging party's national origin; and

(3) Percentage of persons of charging party's national origin with the requisite skills in the relevant labor market from which the respondent recruits broken down by job classification, assignment, or duties.

After the above information has been obtained, it should be determined whether respondent's policy has the purpose or effect of discriminating against charging party because of his/her national origin. This is established by analyzing the data according to the Uniform Guidelines on Employee Selection Procedures (UCESP). (For analyzing a charge under UCESP, see §610 of this manual. For guidance in establishing whether a citizenship requirement has a discriminatory purpose or effect, see §604, Theories of Discrimination.)

> Example of Purpose or Effect - R has a policy which requires that all its employees be U.S. citizens. CP (noncitizen Hispanic) applied for and was denied employment due to this policy. CP filed a charge alleging that R's citizenship requirement discriminated against him due to

> his national origin (Hispanic). The relevant workforce in the SMSA is 40% Hispanic of which 15% are citizens and 85% are noncitizens. All of R's employees are citizens. 99% are Anglos and 1% are Hispanic. Based on these facts, an inference that R's citizenship requirement has the purpose or effect of discriminating against CP due to his national origin would be raised.
>
> Example - R has a policy which requires that all its employees be U.S. citizens. CP (noncitizen Chinese) applied for and was denied employment due to this policy. CP filed a charge alleging that R's citizenship requirement discriminated against her due to her national origin (Chinese). The relevant labor market from which R gets its employees was shown by the SMSA to be 30% Chinese of which 29% are citizens and 1% are noncitizens. R's workforce is 70% Chinese and 30% other, and all the employees are U.S. citizens. Based on these facts, no inference that R discriminated against CP because of her national origin would be raised.

(b) Disparate Treatment - During investigation of citizenship requirement charges, the EOS should bear in mind that (s)he should elicit any information which would tend to establish a finding of disparate treatment. The focus of the disparate treatment investigation should be to determine whether the respondent employs any noncitizens who are not of charging party's national origin. (For a discussion of the disparate treatment theory of discrimination, see §604 of this manual.)

> Example of Disparate Treatment - R has a policy which requires that all its employees be U.S. citizens. CP (noncitizen Chinese) applied for and was denied employment due to this policy. CP filed a charge alleging discrimination against him due to his national origin (Chinese). Investigation of the charge revealed that R's workforce does not contain any Chinese employees. It also revealed that R has at various times employed persons of national origins other that CP's who were not citizens. Based on these facts there is reasonable cause to believe that R has discriminated against CP due to his national origin.

(c) Federal Employment and National Security Exception - The above analysis for investigating citizenship requirement charges should be used with private employers as well as with state and local governments. However, pursuant to Executive Order 11935, it does not apply to citizenship requirements for federal employment nor to charges for which the national security exception in Title VII, §703(g) is raised. (See §§622.3 and 622.4 respectively, below.)

(d) EEOC Decisions - In EEOC Decision No. 76-133, CCH Employment Practice Guide ¶6695, the Commission, adhering to the Supreme Court's decision in Espinoza v. Farah Manufacturing Company, Inc., 414 U.S. 86, 6 EPD ¶8944 (1973), found that a state statute which required U.S. citizenship for state employment did not violate Title VII *per se* because it was not shown that the citizenship requirement had the purpose or effect of discriminating on the basis of national origin. The Commission reached the same result in EEOC Decision No. 76-111, CCH

Employment Practices Guide ¶6677 (no showing that a state statue which required U.S. citizenship for state employment had the purpose or effect of discriminating on the basis of national origin), and in EEOC Decision No. 76-141, CCH Employment Practices Guide ¶6702 (no showing that a municipal statute which required U.S. citizenship for municipal employment had the purpose or effect of discriminating on the basis of national origin).

(e) Espinoza v. Farah Manufacturing Co., Inc. - In Espinoza v. Farah Manufacturing Co., Inc., supra, the Supreme Court held that a citizenship requirement for employment did not discriminate on the basis of national origin because it was shown that about 96% of the respondent's employees were of the same national origin as charging party (Mexican- American). The Supreme Court concluded that since the majority of the respondent's employees were of the same national origin as charging party, the citizenship requirement did not have the purpose or effect of discriminating on the basis of national origin and was therefore not in violation of Title VII. Espinoza, 414 U.S. at 92.

(f) State Law Defense - The Commission's Guidelines on Discrimination Because of National Origin (29 C.F.R. §1606.5(b)) provide that a state law which prohibits the employment of noncitizens will be superseded by Title VII whenever such laws have the purpose or effect of discriminating on the basis of national origin. In investigating charges in which this defense is raised, obtain and analyze the same type of evidence as in §622.2(a), above.

Note: Although citizenship requirements are not necessarily violations of Title VII, some of these requirements have been declared unconstitutional under the Fourteenth Amendment's Equal Protection Clause and under the Civil Rights Act of 1866 (42 U.S.C.A. §§1981, 1982, and 1983). (For an analysis of this related authority, see §622.8, below.)

622.3 Citizenship Requirement for Federal Employment

(a) Introduction - On September 2, 1976, President Gerald Ford, in response to the Supreme Court's opinion in Mow Sun Wong v. Hampton, 426 U.S. 88, 11 EPD ¶10,955 (1976), issued Executive Order 11935 which effectively barred aliens from federal civil service employment. President Ford cited both the Constitution and statutory law; i.e., 5 U.S.C. §§3301, and 3302; as authority for his issuance of Executive Order 11935. 1/

(b) Executive Order 11935 - Executive Order 11935, codified at 5 C.F.R. §7.4, reprinted in 41 Fed. Reg. 37301 and in CCH Employment Practices Guide ¶3764 provides as follows:

> (a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.
>
> (b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.

1/ 5 U.S.C.A. §3301 provides in pertinent part that: "The President may--(1) prescribe such regulations for admission of individuals into the Civil Service in the Executive Branch as will best promote the efficiency of that service...."

> (c) The Civil Service Commission (now Office of Personnel Management) may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.

The constitutionality of Executive Order 11935 has been challenged under the Fifth Amendment's Due Process Clause in *Mow Sun Wong v. Hampton*, 435 F.Supp. 37 (N.D. Calif. 1977), affirmed, *sub nom* *Wong v. Campbell*, ___F.2d ___, 24 EPD ¶31,262 (9th Cir 1980). In *Wong v. Campbell*, the Ninth Circuit concluded that the President did have the authority to issue Executive Order 11935 and that it did not violate the Due Process Clause of the Fifth Amendment because it was within the President's power to promulgate rules for the civil service. The same result was reached by the District of Columbia's Circuit Court of Appeals in *Jalil v. Campbell*, 590 F.2d 1120 (D.C. Cir. 1978); by the U.S. District Court in Puerto Rico in *Ramos v. U.S. Civil Service Commission*, 430 F.Supp. 422 (D.C. P.R. 1977), which also held that E.O. 11935 had the same effect as a statute and was therefore entitled to full legal effect; and by the Seventh Circuit in *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), which also held that E.O. 11935 did not violate the Civil Rights Act of 1866. See also *Yuen v. IRS*, ___F.Supp.___, 24 EPD ¶31,228 (S.D.N.Y. 1980) (no equal protection violation by federal statute which required U.S. citizenship for federal employment).

622.4 National Security Exception

(a) *Introduction* - Section 703(g) of Title VII provides as follows:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, if—
>
> (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive Order of the President; and
>
> (2) such individual has not fulfilled or has ceased to fulfill that requirement.

(b) *Applicability of National Security Exception* - As long as the two conditions stated in §703(g) above are met, "it is not an unlawful employment practice to deny employment opportunities to any individual who does not fulfill the national security requirements...." 29 C.F.R. §606.3.

In instances where citizenship is required by statute or executive order for national security reasons, e.g., in some defense related industries, §703(g) applies, and it relieves the employer from liability for his actions based on the employee's or applicant's lack of citizenship. (See EEOC Decision 71-189 in §622.4(c).)

In other instances, since Executive Order 11935 requires U.S. citizenship for the majority of federal jobs, (i.e., those in the competitive service, reliance on the §703(g) exception will generally only be necessary where federal jobs are excepted from competitive procedures. Additionally, Exective Order 11935 should be read in conjunction with 5 U.S.C. §7532 which permits designated executive branch agency heads to suspend or remove an employee in the interest of national security. In light of these provisions dealing with federal employees, there will probably be more occasions to rely on §703(g) when dealing with private sector and state and local government employers.

The focus of an investigation of a charge in which the national security exception is raised should be to determine:

(1) whether the requirement claimed to be imposed in the interest of national security is pursuant to or administered under any statute of the United States or any Executive Order of the President; and

(2) whether the individual affected has failed to or has ceased to fulfill that requirement.

If during the investigation of such a charge it is found that the employer has raised the national security exception without authority of statute or executive order, the EOS should determine whether there is evidence of prohibited discrimination which warrants the drafting of a cause LOD. If, however, there is legal authority, i.e., a statute or executive order, under which the exception is appropriately raised, the next step is to determine whether the individual has failed or ceased to fulfill the requirement. As indicated above, as long as the two requirements are met the exception is applicable.

Charges alleging national origin discrimination where there is a citizenship requirement that is imposed by statute or executive order in the interest of national security are CDP. However, if an employer has a national security requirement other than citizenship which is imposed with or without authority of statute or executive order, contact the Office of Policy Implementation for guidance in processing the charge.

(c) EEOC Decisions - In EEOC Decision 71-189 (unpublished), charging party was born in Canada of parents of Lithuanian and Polish ancestry. He was employed by respondent as a painter on a project involving the construction of facilities for the Federal government. He was discharged on the second day of his employment, and alleges that the discharge was because of his national origin. Under agency regulations, persons born outside of the United States must produce a certificate of naturalization, i.e., proof of citizenship, in order to be employed in various defense related projects. Although charging party produced various documents in support of his claim of United States citizenship, the agency informed respondent that charging party's inability to produce a certificate of naturalization would preclude his entry into the project area. Held: No Cause, per §703(g) of Title VII.

In EEOC Decision No. 71-806 (unpublished), charging party, a naturalized citizen, alleged that he was denied a promotion because of his Yugoslavian origin. Respondent admitted that charging party was the most qualified applicant, but defended on the grounds that the position for which charging party applied required a secret security clearance, that the position needed to be filled immediately, and that, because charging party was from a Communist country and still supported relatives there, it would take from six months to a year to get the required clearance. Respondent's records showed that in order to fill the position immediately respondent obtained an employee from another company who already had the required security clearance. Respondent's Security Administrator, who had substantial experience in security applications, testified that it takes 6 to 12 months to obtain clearances for persons with relatives in Communist-controlled countries. There was no evidence that employees of other nationalities had received more favorable treatment from respondent in securing such clearances, and the position was ultimately not filled by promotion. Accordingly, the Commission credited respondent's defense. Held: No Cause, based upon §703(g) of Title VII.

622.5 Aliens Employed Outside of the United States by U.S. Employers

(a) Introduction - Section 702 of Title VII provides that "This title shall not apply to an employer with respect to employment of aliens outside any state...."

For purposes of §702, "[t]he term 'State' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the [Panama] Canal Zone, and Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act." (See §701(i) of Title VII of the Civil Rights Act of 1964, as amended.) Pursuant to this section, Title VII jurisdiction applies to all employers within the "states" as defined above. If after counselling regarding Title VII jurisdiction, a potential charging party insists on filing a charge, the charge is to be taken, assigned a charge number and subsequently dismissed.

It should be noted that §702 of Title VII applies only to the employment of aliens outside the United States. It does not preclude U.S. citizens from filing Title VII charges against U.S. employers (as defined in §701(b) of Title VII) who have job sites outside the United States, nor does it preclude aliens from filing charges against employers who are located within a "state" as defined above.

> Example 1 - XYZ Corp., a U.S. corporation, has a job site in Australia. CP, an Australian citizen of African origin, insists on filing a Title VII charge alleging racial discrimination. There is no jurisdiction under Title VII because the job site is outside of a state and the applicant is an alien.
>
> Example 2 - XYZ Corp., a U.S. corporation, has a job site in Hong Kong. CP, an American citizen, applied for and was denied employment at this job site. CP filed a charge alleging racial discrimination. There is Title VII jurisdiction and the charge should be processed.
>
> Example 3 - CP filed a race discrimination charge against ABC Hotel, an enterprise wholly owned and operated by a citizen of Guam. Since Guam is a "state" within the meaning of §701(i) of Title VII, there is Title VII jurisdiction, provided of course that ABC Hotel is an "employer."

(b) Federal Court Cases - In Bryant v. International School Services, Inc., Civil Action No. 78-251 (D.C. N.J. December 4, 1980), the U.S. District Court in New Jersey held that as a matter of statutory construction, Title VII of the 1964 Civil Rights Act is applicable to acts of discrimination committed against U.S. citizens outside the territorial limits of the U.S. The court reasoned that, by negative implication, Congress intended to provide relief to nonaliens employed by an employer otherwise subject to the Act when it expressly excluded aliens employed outside any state.

622.6 Residency Requirements

(a) Introduction - Residency requirements, like citizenship requirements, are not *per se* prohibited by Title VII. They are, however, prohibited by Title VII if they are imposed in a discriminatory manner based on race, sex, color, national origin, or religion.

(b) Processing a Residency Requirement Charge - In processing a charge which raises the issue of residency requirements as discriminatory on the basis of race, sex, color, national origin, or religion, the following information should be obtained and broken down into the category for the basis under which the charge is filed:

(1) the SMSA for the entire metropolitan area in which the charge is filed;

(2) the SMSA labor force for the entire metropolitan area;

(3) the labor force for the city, county, or other jurisdiction with the residency requirement;

(4) the exact residency requirement;

(5) respondent's labor force; and

(6) applicant flow data.

The above list is intended to be a guide and not exhaustive of the type of evidence needed for a residency requirement charge. After all the evidence is obtained it should be analyzed to determine whether there is adverse impact. In conducting the investigation, the EOS should bear in mind that the disparate treatment theory may apply and should solicit evidence which may be indicative of such. It should also be noted that the residency requirement may have an adverse impact on one group but not on another, depending upon who is challenging the residency requirement and on what basis. The following examples are illustrative of these points.

> Example 1 Adverse Impact - City B has a residency requirement which requires that all city employees reside within its city limits. The labor force for the city is 70% Black (90% are residents), 28% White (87% are residents), and 2% other. CP (Black) was denied employment due to his status as a nonresident and filed a charge alleging racial discrimination. Investigation of the charge revealed that 80% of City B's employees are Black, 19% are White, and 1% Hispanic, Asian, and other. All of City B's employees are residents. The residency requirement does not have an adverse impact on Blacks.

> Example 2 Disparate Treatment - City B has a residency requirement which requires that all city employees reside within its city limits. The labor force for the city in which this charge is filed is 60% White, 35% Black, 3% Hispanic, 1% Asian and 1% other. CP (Black) was denied employment due to her status as a nonresident and filed a charge alleging racial discrimination. Investigation of the charge revealed that some of the city's White employees do not live within the city limits of City B and that City B has never hired any Blacks who did not meet the residency requirements. The disparate treatment theory applies to these facts and a cause determination should be issued.

(For a complete discussion of the adverse impact and disparate treatment theories of discrimination, see §604, Theories of Discrimination.)

Residency requirements which are also employee selection procedures fall within the Uniform Guidelines on Employee Selection Procedures (UGESP). 29 C.F.R. §1607. Charges which raise residency requirements or issues should be analyzed according to the UGESP. (For guidance in analyzing these charges under the UGESP, see §610 of this manual.)

Note: Although residency requirements may not be in violation of Title VII, they may be unconstitutional under the 14th Amendment's Equal Protection Clause and under the Civil Rights Act of 1866. (See §622.8 for a discussion of this related authority.)

(c) EEOC Decisions

In EEOC Decision No. 71-1471, CCH EEOC Decisions (1973) ¶6220, the Commission found that an employer's use of a policy of refusing employment to persons who resided more than 25 miles from its plant and who lacked private transportation could not be viewed as unlawful discrimination against Blacks. The high rate of participation of Blacks in the work force indicated that the residency reqirement did not have a disproportionate impact on Blacks as a class.

In EEOC Decision No. 72-1176, CCH EEOC Decisions (1973) ¶6359, the Commission found that there was a reasonable basis for finding that an employer committed unfair employment practices by failing to hire charging party and other Hispanics because of their national origin. The employer's contention that it preferred someone who had lived in the area for many years was without merit because the employer had previously hired a person who came from a different region of the country.

In EEOC Decision No. 71-1300, CCH EEOC Decisions (1973) ¶6210, the Commission found that an employer and a labor union engaged in discrimination on the basis of sex and national origin by maintaining a bargaining contract under which male flight stewards were domiciled in Hawaii, were paid a cost-of-living bonus, and received layover benefits while in San Francisco on the basis of such domicile. Female flight stewardesses were domiciled in mainland United States and not given any layover benefits while in San Francisco whether domiciled there or not.

622.7 Undocumented Workers - Applicability of Title VII

(a) Introduction - The fact that a potential charging party is or is not a citizen of the United States does not preclude him/her from filing a Title VII charge. The U.S. Supreme Court has held that "aliens are protected from discrimination under the Act." See Espinoza v. Farah Manufacturing Company, supra, 414 U.S. at 95. Furthermore, the acceptance or rejection of a Title VII charge should not hinge upon the potential charging party's status as a documented or undocumented alien. It is the Commission's position that the term "any individual" in §703 of the Act includes any person whether documented or not, within the jurisdictional boundries of any "State"; i.e., any state of the U.S., the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the [Panama] Canal Zone, and Outer Continental Shelf Lands as defined in the outer Continental Shelf Lands Act.

(b) Charge Processing - Charges filed by undocumented workers are to be filed on the basis of national origin, race, color, sex, or religion, not on the basis of the person's status as an undocumented worker. Only if an individual's status as a documented or undocumented worker is pertinent to the allegations in the charge should (s)he be quiried about his/her status under the Immigration and Nationality Act. However, when the person's status as an undocumented worker is raised by the respondent as a defense to a charge of failure to hire, the issue becomes non-CDP, and OPI should be contacted prior to drafting an LOD.

(c) Related Authority - In NLRB v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979), the Ninth Circuit held that employed aliens were "employees" as defined by the National Labor Relation Act (NLRA), even though they were undocumented and not entitled to work or reside in the U.S. The Ninth Circuit further held in Apollo that since the defendant had violated the NLRA, reinstatement was proper relief for the undocumented "employees".

In NLRB v. Sure-Tan, Inc., 583 F.2d 356 (7th Cir. 1978), the Seventh Circuit held that undocumented workers were protected by the Taft-Hartly Act and concluded that immigration laws neither prohibited the aliens from working nor from exercising their rights under the Taft-Hartly Act.

In NLRB v. Duke City Lumber Company, 251 N.L.R.B. No. 12, the employer and the labor union entered into a collective bargaining agreement which excluded undocumented workers. The NLRB held that the undocumented immigration status of the excluded employees was neither a ground for exclusion from a bargaining unit nor a disqualification for their participation in elections conducted by the Board.

The Fifth Circuit has held that the provision of the Civil Rights Act of 1866 which states that all persons within the jurisdiction of the U.S. shall have the same privileges, rights, immunities, and protection of the laws as are enjoyed by White citizens is applicable to aliens. See Guerra v. Manchester Terminal Corporation, 498 F.2d 641 (5th Cir. 1974).

622.8 Civil Rights Act of 1866 and the Fourteenth Amendment

(a) Introduction - Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the unfair labor practices provisions of the National Labor Relations Act (NLRA), and the Fourteenth Amendment of the Constitution overlap in the area of employment discrimination. They are, however, separate and independent statutes, and conduct creating liability under one act may or may not create liability under another.

(b) Citizenship Requirements Under the Civil Rights Act of 1866 and the Fourteenth Amendment - As previously stated, citizenship requirements are not prohibited by Title VII of the Civil Rights Act of 1964 so long as they do not have a discriminatory purpose or effect. Espinoza v. Farah Manufacturing Co., 414 U.S. at 92. When a citizenship requirement is challenged under the Civil Rights Act of 1866 (42 U.S.C.A. §§1981 *et seq.*), and/or the Fourteenth Amendment, however, the courts have taken a different approach and obtained a different result. The Supreme Court and various other courts have concluded that an employment practice which discriminates on the basis of citizenship is prohibited by the Civil Rights Act of 1866 which grants all persons in the United States the same privileges, rights, and immunities as are enjoyed by White citizens. Furthermore, when such a requirement is challenged under the Civil Rights Act of 1866 and/or the Fourteenth Amendment, the requirement undergoes "strict judicial scrutiny" because aliens are a "suspect classification." See *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 658 (1976); *Sugarman v. Dougall*, 413 U.S. 526 (1973); and *Guerra v. Manchester Terminal Corporation*, 498 F.2d 641 (5th Cir. 1974). It should be noted that when testing the constitutionality of a state's statute which excludes aliens from employment *in the state's governmental functions*, a lesser standard of judicial scrutiny (the "rational basis" test) is utilized. See *Foley v. Connelie*, 455 U.S. 291 (1978) (no violation of Equal Protection in requiring state troopers to be U.S. citizens because state troopers perform a state governmental function); and *Ambach v. Norwick*, 441 U.S. 68 (1979) (no violation of Equal Protection in requiring state's public school elementary teachers to be U.S. citizens). Finally, challenging a citizenship requirement for employment should not hinge upon whether the requirement is "under color of law", i.e., "state action", for it has been held that the Civil Rights Act of 1866 applies to *private* as well as public discrimination. See *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974). (For further authority, see also: *Andrade v. Nadel*, ____F.Supp.____, 21 EPD ¶30,498 (S.D.N.Y. 1979) (state statute which required citizenship for employment discriminated against plaintiff, a lawfully admitted permanent resident alien); *Ramirez v. Sloss*, ____F.2d____, 22 EPD ¶30,802 (5th Cir. 1980) (municipal statute which required U.S. citizenship for municipal employment discriminated against plaintiff, a lawfully admitted permanent resident alien); *Chavez-Salido v. Cabell*, ____F.2d____ (9th Cir. 1980) (requirement that California probation officers be U.S. citizens discriminated against permanent resident aliens — the statute here was also unconstitutional because it was overbroad); and *De Malherbe v. Elevator Constructors*, ____F.Supp.____, 2 EPD ¶30,295 (N.D. Calif. 1979) (plaintiff was unconstitutionally excluded from a union minority recruitment program because of his alien status).)

(c) *Counselling Potential Charging Party Regarding Citizenship Requirements*

When processing a case in which the potential charging party raises the issue of citizenship requirements, (s)he should be advised that such requirements are not *per se* prohibited by Title VII, but that they may be unconstitutional under the Fourteenth Amendment and/or the Civil Rights Act of 1866, depending on the circumstances. Charging party should be advised that since the EEOC is charged only with enforcing Title VII, (s)he may want to obtain private counsel to challenge the questionable citizenship requirement under the Fourteenth Amendment and/or the Civil Rights Act of 1866.

622.9 *Cross References*

(a) Theories of Discrimination, §604
(b) Adverse Impact in the Selection Process, §610

Mr. **Mazzoli.** Thank you very much, Mr. Troy, Mr. Pendleton.

I yield myself 5 minutes to begin the questioning.

Mr. Pendleton, is it your general feeling that there is no need for further legislation with respect to immigration reform, particularly the section that deals with employer sanctions?

Mr. **Pendleton.** Mr. Chairman, I think that we already have enough on the books at this time, and that to create another protected class among the many protected classes that have been created by Congress, and then to create a bureaucracy around it, I think is just not appropriate.

Mr. **Mazzoli.** Let me ask you this question, and I understand the philosophy behind that. What happens if you fall in the crack between 3 employees or 4, or actually the cutoff at 15? Because if I understand the EEOC, which enforces the Civil Rights Act, it says that, you know, if there is discrimination based on national origin, it is only with respect to employers in the larger classes, those with 15 or more employees.

Since a lot of the discrimination we have found in the country and a lot of the mischievous hiring of people who are not in this country with legal papers occurs in small employment situations, do you feel that there ought to be some application of title VII or some application of Equal Employment Opportunity's ability to investigate these cases, to apply to smaller employers?

Mr. **Pendleton.** As I said in my statement, Mr. Chairman, if it is found that is a problem, at a later date you can revise the legislation as you see being appropriate. I must say in my own home town of San Diego, I understand that last year we had 427,000 returnees below the San Ysidro border. That means they come back in the afternoon, if they don't make it in the morning, and if they don't make it in the afternoon they'll come back at night. It isn't a different 427,000, it's the same group. But when you see the activity that goes on when there is, in a sense, a raid at an establishment, there are more than 15 employees there. I think we've taken care of it that way. I do think there gets to be a problem in the other areas around, especially in my territory that I have some experience with, that you can amend a bill later. That's how to do that.

Mr. **Mazzoli.** Let me ask you this question. You mentioned in your statement that you did not think the Civil Rights Commission was equipped to do the massive amount of monitoring and active investigation that you seemed to think contemplated by the bill.

Is it that you don't feel the Commission is equipped from the standpoint of its mission to do that, or that it simply has not the men and women and resources which, if represented to you, would then enable you to do that job?

Mr. **Pendleton.** Well I think a little bit of both. It would change the statutory purpose of the Commission, I think, considerably, and give it some enforcement functions which it's never had. I think it takes it out of that category of being a think tank, if you will, and a monitoring agency, into one, again, of enforcement.

The other situation certainly is that the matter of budget—there's been some conservative estimates given by the Congressional Budget Office. It would take approximately $3 million to do that, which would be a quarter of our budget, and that's a very conservative estimate. I'm not so certain that we would know who we would oversee in that case of enforcement. If it's a matter of enforcement of what happens at the various borders, that's one issue. I'm just not so sure how we would do it.

Mr. MAZZOLI. Mr. Troy, Mr. Thomas has submitted a statement which I have before me, too. He talked a good deal more than you did, of course, this morning on the question of whether or not EEOC was needed, whether the current law was enough.

Are you free or comfortable in venturing any opinions with respect to what Mr. Thomas has said in the sense that national origin discrimination should cover most of the existing job application hiring/firing questions, rather than to worry about this new question of alienage?

Mr. TROY. Yes. I've read the chairman's statement also. We believe with our distinguished colleague here, somewhat for the same reasons, that title VII will cover—most of the situations. The situation that you raised about smaller employees is a live one, is a real one. I don't want to venture into what to do about it.

One idea that was bounced in our employment discussion was, that title VII could be amended to go down to that level; if we think the discrimination that may exist from the passage of H.R. 3080, is going to be large enough. That's probably all I want to say about it.

Mr. MAZZOLI. I appreciate it, thank you.

My time is expired. The gentleman, our colleague from Wyoming, is recognized for 5 minutes.

Senator SIMPSON. I will try to stay within that constraint, that's fine. I will stay within that.

Mr. Pendleton, I just wanted to ask you this: What evidnce has the Civil Rights Commission ever encountered that alienage discrimination, separate and apart from national origin discrimination, exists and is a problem today in this country?

Mr. PENDLETON. To my recollection, Senator, we have no evidence that that's a problem.

Senator SIMPSON. None whatsoever?

Mr. PENDLETON. Not that I know of.

Senator SIMPSON. Do you have any thought as to why that is?

Mr PENDLETON. No, I really don't. All I can say is that in our complaint process, we receive complaints and funnel them out to the appropriate Federal agency. And I don't know of any statistic we've had about discrimination in the category of alien status, if you will. We get them by race and we get them by gender, what have you, but not by that particular category. Nor have we done—I think our work in this area is really minimal. I indicated in my testimony that our work in 1980 was probably the more extensive and work that we've done has probably been limited to that time period.

Senator SIMPSON. It has been interesting to me, in trying to research and look into it, what it is we're seeking to come upon here. In going back to find out what had been done in this body, in this House or in this Senate before, we find some remarkable civil libertarians, for literally decades, leading the way, while others were not—especially in the other body—but this issue of discrimination based upon alienage is not there. It doesn't appear. It is not the subject of hearings, never has been. I guess, in looking at the past, the discrimination aspects, the thing that gave rise to title VII were certain, quote, "immutable characteristics," unquote, I believe is the phrase, which are with a person and essentially cannot change. The bases of discrimination prohibited by title VII, race, color, sex, religion, national origin, all are immutable characteristics—perhaps religion could be excepted there—which are unchanging. Alienage is a status of change; and, in fact, I say to you the United States encourages that change.

In your opinion, what is the wisdom of creating a new ground of discrimination that is not based on some form of immutable characteristic?

Mr. PENDLETON. Mr. Simpson, I would not begin to question the wisdom of those who propose this. But I can make this comment, that when Congress began to create protected classes—and this goes on and on and on since 1964—and there's always been a new group of people at some point to be protected. I believe that somehow it's convenient to create a protected class rather than to rely on the discrimination laws we already have on the books.

At the Commission, we had to return a report, and had considerable discussion, even in congressional quarters, about migrant workers in the State of Virginia, and the report that came to us from the Virginia SAC in a sense made migrant workers a protected class. That was not a protected class under our jurisdiction. And there was considerable time spent revising that report to be able to identify the civil rights plight of migrant workers, but not in terms of them being a protected class.

It is further my own contention that, at a local level, it is more convenient for legislators, if you will, to rely on court decisions about quotas and the like than it is to go back and enter in—that is, mayors, as chief elected officials, as well as being the chief personnel office of the city, can certainly say, "we want no more discrimination." I think in the cases that we have here there should not be any discrimination in hiring. And I don't think you have to create a class to identify a kind of discrimination.

Senator SIMPSON. Mr. Troy, just a couple of questions, then I'll defer to my colleagues.

To the best of your knowledge, does alienage discrimination, separate and apart from national origin discrimination, occur today in other than isolated or incidental circumstances?

Mr. TROY. I have not read nor am I aware of any studies by any agency which would suggest a "yes" answer to that question. We are thoroughly involved in national origin discrimination. We never got into that kind of discussion, as to determine the difference between alienage discrimination and national origin.

We've seen some incidents where, for example—after your discussion of the Simpson-Mazzoli bill last year, we asked our district directors, especially in the areas where we have large concentrations of documented workers or people from other countries, to give us their estimate of what impact passage of Simpson-Mazzoli would have on EEOC; and they did some looking around in their jurisdictions. We found, for example, in one company, the company asked all the Hispanic employees to prove that they are documented, but did not ask the Samoans or someone else. That's just about as far as we had gotten into the discussion of whether or not there is alienage discrimination as opposed to national origin discrimination.

Senator **Simpson**. Thank you, Mr. Troy. My 5 minutes has expired.

Mr. **Mazzoli**. Thank you very much.

The gentleman from Massachusetts.

Mr. **Frank**. Thank you, Mr. Chairman. I guess this is going to become a debate on the merits, in part, and so I feel constrained to join it.

Let me begin by saying that the reason many of us feel that some protection based on citizenship status is important in the pending bill dealing with sanctions; that is, those of us who are arguing that the existence of employer sanctions based on whether one is legally in this country may lead to discrimination, aren't surprised that in the absence of that we haven't had it. The Senator was looking for things that no one claims are there, because we are of the view that it's the employer sanctions that may be triggering this in the future. So, the fact that we haven't had it in the absence of employer sanctions doesn't seem, to me, to be persuasive.

I would also say that reference was made to the fact that Congress has previously rejected this particular form of antidiscrimination. It seems to me that for advocates of an immigration bill to say that because Congress has previously rejected something we ought not to do it again, they are falling into dangerous ground, since nothing has been more recently repeatedly rejected than immigration and that deters neither the Senator, nor myself, nor our indefatigable chairman here on the House side. So, we all intend to continue with it.

The issues have been brought out, when we asked about the less than 15, and I was somewhat surprised at Mr. Pendleton's suggestion that, "Well, we'll just wait and see, and if it becomes a discriminatory factor we can do it later on." I guess that's why some of us think, and I want to be explicit about this, we need a new agency.

Mr. Pendleton, you referred to the Civil Rights Commission as reconstituted. Well, some of us think that reconstituted, in this case as in others, means that you've added water to it; and that's why we feel that we need something in addition.

With regard to EEOC, I heard Mr. Thomas, yesterday, tell us that because of the flaws in the statute, the draft of the EEOC, it is not an independent agency, it cannot do the job nearly as effectively as he would like it to be done to protect people who are the victims of discrimination. This was Mr. Thomas' comments. He thinks that the statute needs changes. He's frustrated by its lack of independence.

For 1½ years OMB has been sitting on—this is Mr. Thomas' testimony yesterday—regulations to toughen compliance. Compliance regulations which Mr. Thomas believes, and I agree with him, need to be enacted to give EEOC compliance some teeth. And it's not the fault of the Commission. They're being sat on by OMB for 1½ years, and he cannot even get an answer. We recently had a court decision in the 11th circuit which said that when the Equal Employment Opportunity Commission found the Office of Personnel

Management of the Federal Government to be violating an individual's rights, and the Office of Personnel Management refused to abide by the decision, EEOC's decision didn't count for anything. And we can't even get, apparently, the President of the United States, to direct other Federal agencies to follow EEOC.

So, we're not talking here so much about defects of EEOC that are the fault of individuals, leave that aside whether people think that or not, we have the Commission's own testimony that it's structurally not able to exercise that independence. And that's, again, why we think this is necessary.

Let me just ask, Mr. Troy, we are talking now about legislation which doesn't protect all aliens, which only seeks to offer protection to those who are not yet eligible for citizenship, or if they are eligible for citizenship, are in the process of trying to acquire it. And I mention that because I think one of the subsequent business group testimonies suggests that we should keep this out of here as an incentive for people to become citizens. I hope, between now and the time they testify, they will read the bill and perhaps they will be allowed to amend their testimony, because that's an irrelevant comment since we're only talking about people who will become citizens.

The question is this. This scheme, which I think is a good one in this bill, is balanced. And what we say is, sanctions to keep people from working if they're not here legally, and hopefully to prevent people from being drawn here, a legalization program that takes the people who are already here and allows them to work, because if the sanctions go in otherwise they won't be able to work. what happens to an individual who has entered, admittedly, illegally, has been here long enough to qualify for the legalization program, if we get one? I realize it's a triggered legalization program now, but the individual decides to come forward and say, "OK. I will accept this, because I would rather live and take advantage of this legalization which I think is a good thing," and the employer says, "I'm sorry, I refuse to hire you because you originally came here illegally and you're in this unclear status, and I'm not going to hire you." That's the people I'm worried about, because I think it may become a disincentive for people to apply for legalization.

Would such an individual have protection, now—obviously, if there's an employer of less then 15, no protection, but suppose an employer of a couple of hundred people says, "I'm not hiring any of those people in that legalization program because I think it's a lousy program, and who knows what's going to happen, and it may be tricky." Is there any legal protection if someone says they're not going to hire those people?

Mr. Troy. Well, Mr. Frank, if your question is whether or not title VII covers discrimination or prohibits discrimination——

Mr. Frank. Title anything. Is there any law on the books which protects those people that you know of?

Mr. Troy. Citizenship, the answer's no. But our interpretation of title VII is a broad one, and our guidelines very strongly state that if citizenship is used in a manner that has the purpose or effect of discriminating against someone, then it is covered in title VII.

Mr. **Frank**. Well, I don't see, if discriminating against someone. I think you've given me both answers, maybe I can pick the one I want.

If someone says, "I won't hire you because you're in that legalization program, and you're not a citizen, and I don't see what we can do with you, it's too tricky," is he or she protected?

Mr. **Troy**. Yes. We would have to determine whether or not there's disparate treatment——

Mr. **Frank**. On what ground?

Mr. **Troy**. Under our guidelines of citizenship.

Mr. **Frank**. But suppose it doesn't differentiate based on race or national origin?

Mr. **Troy**. Well, then, no, it does not.

Mr. **Frank**. Well, that's what I'm talking about, so the answer is no. And that's the people, because if they've hired some Mexican-American citizens and some Mexican immigrants who become citizens, but they haven't hired them under the legalization program, they get no protection.

Mr. **Mazzoli**. The gentleman's time has expired.

Mr. **Frank**. Thank you.

Mr. **Mazzoli**. The gentleman from Wisconsin is recognized for 5 minutes.

Mr. **Sensenbrenner**. Thank you, Mr. Chairman.

By way of preface, let me say that, for the 7 years I've served in Congress, I've been on the House Civil and Constitutional Rights Subcommittee, and, of course, for the last 4 I've served as the ranking minority member of the subcommittee; so I do believe that I've gotten some familiarity with civil rights laws and their enforcement during my service on this committee.

I also remember, a couple of years ago during the full Judiciary Committee markup of this legislation, that my eloquent and loquacious friend from Massachusetts, Mr. Frank, said that the Simpson-Mazzoli bill provided a happy marriage of employer sanctions and amnesty for illegal aliens.

Mr. **Frank**. I didn't say it was happy.

Mr. **Sensenbrenner**. Now I understand that the marriage has been expanded to include the antidiscrimination provisions, too, and I'm just wondering whether this is upping the ante or legalizing polygamy. Hopefully, we'll find out later on today which is the case.

I have two questions. The first is directed to Mr. Troy.

What disturbs me is that the Frank antidiscrimination provisions do not seek to amend title VII, which has been our accepted manner of dealing with employment discrimination for the last 21 years, but rather establish a new law, a new enforcement procedure. In your prepared statement you stated that when an employment discrimination charge is filed with the EEOC, your investigation is confined strictly to the allegations that have been stated in the complaint.

Since many of the people who would qualify under the Frank amendment on alienage discrimination would also qualify under a title VII complaint of national origin discrimination, doesn't this give a complainant two chances to complain, two "kicks at the cat," and, in effect, subject the employer respondent to double jeopardy?

Mr. **Troy**. I guess the best answer to that is that it could happen. But I think if I read the bill right, there was a preclusion that if a person came to EEOC they would not get another bite on the other side and vice versa.

Mr. **Sensenbrenner**. Let me ask you about your caseload. In order for an employer to fall under the jurisdiction of the EEOC, not only does the employer have to meet the threshhold of the number of employees, but those employees have got to be somewhat permanent, in other words, they've got to be employed for, I believe, 20 calendar weeks, either during the current or preceeding calendar year. There is no such requirement in the Frank amendment that the number of employees be somewhat permanent.

Do you think that that would adversely increase your caseload, and if so, how much more money do you think the EEOC would need to hire enough personnel to process these complaints?

Mr. **Troy**. We tend to believe that there is a possibility that our workload would increase. We have not been able to discuss it to the degree that we could make some estimates as to how much it would increase. This is kind of new to us. And I would not want to venture a guess as to how much more money we would need.

Mr. **Sensenbrenner**. I have one quick question of Mr. Pendleton, and this somewhat dovetails with the questions that Senator Simpson has asked.

The traditional title VII complaints of race, creed, color, national origin and the like, have been based on something other than status, and with the possible exception of religion those factors don't change. Has the Civil Rights Commission done any studies, or reached any conclusions, or received any complaints that there is significant discrimination in the workplace based upon any issue of status which can be changed by the person who complains that discrimination has been practiced against him?

Mr. **Pendleton**. Not to my knowledge.

Mr. **Sensenbrenner**. So, we would be plowing new ground by establishing a protected class based upon a tangible status?

Mr. **Pendleton**. I think you would. And you've also plowed new ground before by creating new protected classes. And whether that's status or some other characteristic, you've created them; and I think that the creation of those classes has caused more bitterness and disharmony than it's caused harmony at the workplace.

Mr. **Sensenbrenner**. One final question: If an alienage discrimination provision were put in, do you think it would be illegal for a retail store to deny a job to a person who only spoke Spanish?

Mr. **Pendleton**. That's a real load there. I don't know, I'll think about that one a little bit more. I think that my gut tells me it would be illegal to do that, but I think that if you talk about status, you're just talking about Spanish. Talking about all kinds; I mean——

Would you ask me again? Maybe I don't understand what you're asking me.

Mr. **Sensenbrenner**. This would be a retail store position, where a person would have to be communicating with the general public in the course of selling the items in the store and collecting money.

Mr. **Pendleton**. Well, if language becomes a matter of communication—I'm not quite sure I understand what you're getting at.

Mr. **Sensenbrenner**. Well, I think that this is an example of what kind of mischief can result, because obviously, with English being the predominant language in the United States, an essential part of a job description in a retail store is ability to communicate in the English language.

Mr. **Pendleton**. I think the answer to the question, essentially, is yes, it would be illegal to do that.

Mr. **Mazzoli**. The gentleman's time has expired.

The gentleman from California is recognized for 5 minutes.

Mr. **Berman**. Mr. Chairman, it is very interesting that in the areas where I would think you should have an expansive view of the effect of title VII, you have such a narrow one, and in the areas where you should have a literal one, you have such an expansive one.

What about speaking Spanish only and not speaking English comes within the categories of religion, race, national origin, sex? Why would the person who could not speak English and can only speak Spanish not getting a job constitute discrimination under any one of the prohibited classes, not to mention alienage?

In any event, that's so far off——

Mr. **Pendleton**. Well, I appreciate your insight about my ability to do these things.

Mr. **Berman**. The gentleman from Wisconsin raised another issue which I think is quite relevant. He saw it from the point of view of cost consequences, but I see it from a different point of view, and I'd be interested in your thoughts and maybe, more specifically, Mr. Troy's thoughts from the EEOC.

As I understand the present title VII, you are not an employer against whom redress is available unless you employ 15 or more people at least 20 weeks per calendar year; is that correct?

Mr. **Pendleton**. 20 weeks the previous year. That's the way the measure is.

Mr. **Berman**. Senator Simpson mentions his concern that national origin should cover the arguable case that may exist of discrimination. But, in fact, if we just leave title VII alone and don't seek a remedy such as is in the Rodino bill, would it be correct to say that a very large number of farmers in this country, particularly in areas where the crop is seasonal, would be excluded from the prohibitions on discrimination based on national origin because their full-time employment, or their employment for, say, 33 weeks of the year for the previous year, was under 15, even though their peak season planting, thinning, and harvesting employment might go as high as 150, or 200, or 250 employees? Is that a fair conclusion, Mr. Troy?

Mr. **Troy**. Mr. Berman, I would venture to say yes, except I would not say very large. In our caseloads, we have not run into that. We have run into it, but not in a very large volume.

Mr. **Berman**. Well, are you saying that there aren't a number of growers who employ a relatively small number of people year round but for peak season harvesting and planting their work force for anywhere from 3 to 15 weeks a year goes——

Mr. **Troy**. No, I'm not saying that at all, sir. All I'm saying is that while you're right, there are a large number of farmers that have work forces of less than 15 people, especially during seasonal employment, we have not seen a lot of cases come toward our workload from that area. So, I would assume that you're right, OK, when it comes to the fact that a large number are there; but I cannot say that from looking at our workload.

Mr. **Berman**. But, as the gentleman from Massachusetts pointed out earlier, we're discussing this issue in the context of employer sanctions. We know that, for instance, in the State of California, growers heavily rely on Hispanic work force. It is asserted and I think it's fair to say that some number ranging from 20 percent to much higher figures constitute undocumented workers, some of whom are going to be eligible for legalization under this program, many of whom are already legal residents and have green cards, and now would be in a situation where the employer will face certain liabilities.

Senator Simpson, as he prefers the title VII national origin remedy, acknowledges that it's arguable that discrimination may occur as a result of this, and my only point is, title VII is inadequate, apart from anything else, because of the limitation of requiring 20 calendar weeks in the previous year before someone is even deemed an employer, which will exclude huge numbers of agricultural employers and others who rely on peak-season work forces.

Is that a fair---

Mr. **Troy**. That's a fair analysis, and I can't argue about it.

Mr. **Berman**. Thank you.

Do I have additional time, Mr. Chairman?

Mr. **Mazzoli**. I'm sorry you should have asked the question. I think I probably would have let it go on. I'm sorry. The gentleman's time has expired.

The gentleman from New York is recognized for 5 minutes.

Mr. **Schumer**. Thank you, Mr. Chairman.

It seems to me, reviewing the testimony of the two gentlemen—and you tell me if this is not accurate—you're saying three things. You're saying, No. 1, that there is no discrimination right now based on alienage—and let's keep the issue to alienage, because that is the issue we're here on; that, second, if there was, it's already illegal in that you have ways to deal with it—at least Mr. Troy said that; and, third, that such discrimination is legitimate.

Do you think such discrimination is legitimate?

Some people say, particularly after the compromise that we worked out last year, that someone who is not intending to become a citizen, or even someone who is not yet a citizen, shouldn't have the same rights as someone who is already a citizen.

Gentlemen—what is your brief view on that?

Mr. **Pendleton**. To the first question, we have no evidence of the fact that there is alienage discrimination: We don't have that in the complaints category, we haven't received any complaints.

Mr. **Schumer**. Have you done any studies? Have you reached out?

Mr. **Pendleton**. Our only study was done in the previous Commission, "The Tarnished Golden Door," that says it may result. A new commission, or the reconstituted one, has taken no position with respect to any of this.

On the second point, which was the matter that the remedy is already on the books——

Mr. **Schumer**. Right.

Mr. **Pendleton**. I think that that is accurate. What I did say, in my testimony, is that if you find out that those are not sufficient under title VII, perhaps you need to revise and reissue title VII.

With respect to whether it's being legal or not, I think that anytime an employer can show that a skill is required, like speaking English, is required on the job, if he can prove that, then it is required that you speak English.

Mr. **Schumer**. That's a different issue. There are aliens who speak English, there are aliens who don't speak English.

Mr. **Pendleton**. You asked me my——

Mr. **Schumer**. I'm asking you, do you think it's appropriate that citizens should get a higher status than noncitizens in terms of discrimination? If an employer wants to choose citizens, it's legitimate?

Mr. **Pendleton**. I think that we talked about national origin already being on the books. I think that's sufficient.

Mr. **Schumer**. Let's take two people of Spanish origin: They both speak English, one is a citizen, one is not a citizen but intending to become a citizen. Employer says, "I'd rather hire the citizen, he's already an American. I like to hire Americans." Some members of this panel have taken that viewpoint. What's your viewpoint?

Mr. **Pendleton**. Well, I think it's clear that the employer makes the best selection he or she possibly can in that instance, and that if there's discrimination in the case, then the person has a right to redress based upon national origin.

Mr. **Schumer**. It's very hard when, in all due deference, sir, you don't answer the question that was asked. The question that was asked was not based on national origin. My question was: The two people are both of Spanish origin, and the employer said, "I'm hiring you, Fred, because you're a citizen, and I'm not hiring you, Ralph, because you're not a citizen, even though you intend to become one."

Is that actionable now and is that right?

Mr. **Pendleton**. I don't think that it's right.

Mr. **Schumer**. OK, that's the answer to the third question.

Now, the second question: Could Ralph, in the hypothetical I posed, go to anybody in the United States and say, "I want redress"?

Mr. **Pendleton**. I defer to Mr. Troy.

Mr. **Schumer**. Mr. Troy.

Mr. **Troy**. Not that I know of.

Mr. **Schumer**. Right. OK, then we've sort of turned around the answer. I don't believe I'm putting words in your mouth, but I'm saying you say there is no provision right now for it.

OK, now we've answered two of the questions.

If you'll allow me, we've said it shouldn't be allowed, so the bill outlaws it. We've said there's no way to do it right now, so the bill has a need. You're saying, now, "Well, let's go back to the first point which you made. You're saying, 'Well, it's not going to happen.'"

First, I scratch my head. It seems to me almost counterintuitive to argue it doesn't happen now. Officials at the Immigration Lawyers Association say that they come across instances today, without employer sanctions, that there is discrimination based on simply citizenship alienage, if you will.

Let me give you another example. The Federal Election Commission gives priority to citizens over aliens.

Would you gentlemen entertain bringing suit or some kind of action before the Federal Election Commission to outlaw that kind of discrimination?

Mr. TROY. Mr. Schumer, let me clarify something.

You've got to know—you're asking for personal opinions of a career civil servant who's charged with upholding the laws that this body passes.

Mr. SCHUMER. Right.

Mr. TROY. And that's what we do.

Mr. SCHUMER. I respect that. I'm not trying, Mr. Troy, to belittle the job you're doing; we're trying to weed out some thorny issues here.

Mr. TROY. I'm not here to get exorcised, either. But I answered the Senator's question, the statement about alienage, in this manner. I said that we had not, as an EEOC body, come across individuals who have come in to us, either rightfully or mistakenly, and alleged anything that relates to alienage that we could not process as national origin.

Mr. SCHUMER. Just one final question with the committee's indulgence.

It seems to me almost intuitive that there are such cases of discrimination. Isn't that your intuition, also, even if such cases haven't come before you?

Mr. TROY. Yes.

Mr. SCHUMER. OK. Thank you.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman, the Senator from Iowa, is recognized for 5 minutes.

Senator GRASSLEY. I appreciate the 5 minutes, but I'm not going to take the time of the committee because I was late in getting here. I'll reserve my questions.

Mr. MAZZOLI. We welcome you and thank you.

The gentleman from Texas is recognized for 5 minutes.

Mr. BRYANT. Thank you.

Mr. Pendleton, I regret that I had another meeting over in the annex building this morning and I arrived here after you completed your testimony. I understood that it was the administration position that there is no evidence of any discrimination with regard to people who are of Hispanic origin or of other nonanglo origin in the workplace, at the present time, and that this is not addressed in some way by present law.

Is that what your position is?

Mr. PENDLETON. In all deference, Mr. Bryant, I don't represent the administration's position at all. I can only say to you that at the Civil Rights Commission we have no evidence that that is the case.

I would say to you—and I'm also saying that to create a new bureaucracy around one new, protected class we believe is inappropriate. We think that you can revise the existing remedies if that gets to be a problem. And I think, in Mr. Schumer's comments, I think you're absolutely right, if there is no provision at this point the question becomes, "Do you create a new bureaucracy and a new class around this issue or do you look at what is already on the books and make that apply?" In the absence of any evidence to that, I think that you have to say that there's no need to do what is being proposed.

Mr. **Bryant**. I'm sure you've answered this before, but what kind of evidence would cause you to decide that we need to act?

Mr. **Pendleton**. In my testimony I said that if you find that that becomes a problem—of less than 15 employees, if that gets to be a problem—then one can revise title VII if you would care to do that. I think that's clear, that's within Congress' right to do that.

Absent any evidence I don't know why you make a correction in advance.

Mr. **Bryant**. Well, do you perceive that it would somehow be costly to make a correction in advance? I mean, wouldn't we simply respond according to the number of complaints we received?

Mr. **Pendleton**. Well, I'm only saying that the evidence is that there aren't those complaints, so if you respond now to no complaints, I don't understand why you do it.

Mr. **Bryant**. I yield back my time.

Mr. **Mazzoli**. The gentleman's time has expired.

The gentleman from Wyoming has requested an opportunity to ask another question. Senator Simpson.

Senator **Simpson**. Mr. Chairman, just of Mr. Troy one other question, and then that will conclude mine—and I appreciate the courtesy of the panel.

To what extent, Mr. Troy, do you believe that the enactment of the antidiscrimination provisions in this H.R. 3080 could create a development of a civil rights law which is inconsistent with title VII?

Mr. **Troy**. I like your question. Your questions are very tough always.

I hate to venture a guess on that question, but let me state this. We saw in other facets of other laws, the Civil Service Reform Act of 1978, for example, where, in the Federal service, EEOC had one side of the Federal process when it came to the appellate process, and MSPB had the other side. And in that law there was a built-in system that when these two agencies disagree, there is a mechanism for agreement to be reached. Now, in the current antidiscrimination provisions, which you would set up, as Mr. Pendleton said, set up one agency to do the alienage discrimination, EEOC still tracking itself on the rules and regulations and principles which we have been doing for 20 years, the situation is likely, I just couldn't venture to say how likely.

Senator **Simpson**. Thank you very much.

Mr. **Berman**. Mr. Chairman.

Mr. **Mazzoli**. The gentleman's time has expired.

Another question?

Mr. Berman. One question.

Mr. Mazzoli. The gentleman from California is recognized.

Mr. Berman. Thank you, Mr. Chairman.

I have a note here, Mr. Pendleton, that indicates that the Commission, in 1980, took a position against the employer sanctions provisions of legislation, on the ground that they determined the employer sanctions would increase employment discrimination against U.S. citizens and permanent resident aliens identifiable with major immigrant groups. At that point, I think it was earlier mentioned, there was no discussion of how to protect against that, but the Commission took that position and you, in a letter of May 11, 1983, to Congressman Garcia, reaffirmed that 1980 Commission position.

Is that correct? And if it is, has the Commission changed its position or have you changed your position?

Mr. Pendleton. Well, at the time it would change the Commission, that's true. That was from the previous Commission, and when the Commission was reconstituted by the Congress we made the statement that we would not be bound by any of the positions taken by the previous Commission. We did not accept nor reject them, as a matter of fact.

Mr. Berman. What about your letter to Congressman Garcia?

Mr. Pendleton. That came in 1983, prior to the Commission's reconstitution. That was before the Commission was reauthorized.

Mr. Berman. You had already been constituted.

Mr. Pendleton. I've been constituted twice.

Mr. Frank. If the gentleman would yield.

Mr. Berman. Yes.

Mr. Frank. That's the prereconstituted Commission, and that doesn't count.

Mr. Pendleton. And as Chairman of the Commission, it's appropriate to send forth a letter. We had a minihearing, if you will, of selected people that came to the Commission to give us an update on the bill since we had first published "The Tarnished Golden Door." We had also met with Senator Simpson and spent some time in his office, the entire Commission. We sent a letter to Congressman Garcia reflecting the fact that there was no need, at that time, it was felt, as though to change the Commission's position, which, I understand, was a 3-to-2 vote at the time.

I would just defer to my colleagues and say that we have not taken a position. We neither accept nor reject the previous Commission's position on this. The views that I've given you today are views that are mine and I've had those for some time.

Mr. Mazzoli. The gentleman's time has expired.

Let me just see if I can sum up both of you gentlemen. I think it's fair, at least it seems to me, to analyze that neither one of you is very comfortable with the idea that a permanent resident alien or someone who has been legally admitted into the country, who is not a citizen but who has indicated his or her desire to become a citizen, as Mr. Frank has said, under that situation, is entitled to a job, entitled to look for work, and found that there is discrimination against that individual simply and solely because he or she is not a full-fledged, certified U.S. citizen. I think I'm correct in finding that both of you feel a little uncomfortable with that, that there seems to be something just a little bit wrong about that, a little bit less than good about it if not.

And I think—am I further correct in saying that what you both seem to feel is that that kind of inadequate situation, for lack of a better term, should be corrected but that you feel that probably it ought to be corrected under existing law, using Mr. Troy's agency which preexists, it's got field offices, it has an established bureaucracy, it has lines of authority, using maybe Mr. Pendleton's shop, as you've talked about it, as a think tank, and analyze your way through this thing?

Is that essentially where you all come out? First, not comfortable with what has been posed here as legitimate situations, and, second, thinking that maybe it's correctable but under existing law with some changes? Is that essentially it?

Mr. **PENDLETON**. Essentially it.

Mr. **MAZZOLI**. And Mr. Troy?

Mr. **TROY**. Right.

Mr. **MAZZOLI**. Gentlemen, thank you very much. We appreciate your testimony.

And we now call our second panel: Kathleen Alexander, Marriott Corp., representing the Chamber of Commerce of the United States, and Pat Choate—and I hope I am pronouncing that correctly—director, policy analysis, of TRW, representing the National Association of Manufacturers.

Ms. Alexander and Mr. Choate, you recognize the time limitation is a fact, that we'll have to rise at about 10 o'clock in order that we might acknowledge the Prime Minister of Singapore's appearance before the joint session. Let me ask you all, if you could, to probably summarize your testimony within, say, 5 minutes.

And, Ms. Alexander, if you would lead, then Mr. Choate.

TESTIMONY OF KATHLEEN ALEXANDER, VICE PRESIDENT OF PERSONNEL SERVICES, THE MARRIOTT CORP., REPRESENTING THE CHAMBER OF COMMERCE OF THE UNITED STATES, ACCOMPANIED BY MARK A. de BERNARDO, MANAGER, LABOR LAW, AND VIRGINIA B. LAMP, ESQ., LABOR RELATIONS ATTORNEY; AND PAT CHOATE, DIRECTOR, POLICY ANALYSIS, TRW, REPRESENTING THE NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY SHARON SPIGELMYER, DIRECTOR, HUMAN RESOURCES AND EQUAL OPPORTUNITY

Ms. **ALEXANDER**. Thank you. Good morning.

I am Kathleen Alexander, vice president of personnel services, the Marriott Corp. Marriott has been a very active member of the Chamber of Commerce of the United States, including service on its board of directors and various committees and councils. Accompanying me today are Mark A. de Bernardo, manager of labor law, and Virginia Lamp, labor relations attorney. On behalf of the Chamber of Commerce of the United States, our Nation's largest business federation, I am pleased to appear before you to testify on this important piece of legislation.

Although we believe that the United States has not lost its capacity to absorb increasing numbers of immigrants and that it benefits from their presence, the U.S. Chamber recognizes that the time for effective immigration reform has arrived. The massive influx of both legal and illegal immigrants which our Nation is experiencing must be addressed effectively by Congress and this administration. Our Nation's ability to control its demographic future is key to retaining the economic and political liberties which we value. The short-term and long-term costs of our currently permeable borders are socially, economically, and politically enormous. The need for clear, rational, and effective immigration reform is apparent to most Americans, particularly to Americans who live in those border States where the problem is both real and pressing.

As you are aware, the U.S. Chamber would prefer a bill without employer sanctions provisions. We recommended and remain committed to an immigration reform bill which effectively would stem the flow of unwanted immigration without opening up the range of issues such as methods of enforcement and potential discrimination resulting from such a provision.

Inherent in any legislation which places sanctions at its center are the inevitable problems associated with discrimination, yet Congress appears determined to make employer sanctions the centerpiece of immigration reform. Based on that, the U.S. Chamber recently reconsidered its long-term opposition to congressional immigration reform legislation and supports the approach taken in the Senate bill S. 1200. This bill in particular, with its revised employer sanctions provision, represents an improved approach to employer sanctions. And while the Senate is not perfect from the chamber's perspective, it is a tough, fair political initiative that we can support.

The chamber's position on immigration policy was never intended to justify or protect those employers who intentionally hire illegal aliens or take unfair advantage of their situation; rather, it has been to prevent legislation which would do two unnecessary things. First, the chamber opposed previous immigration reform bills requiring employers to comply with overly burdensome recordkeeping and verification requirements, whereby fines could be imposed for mere paperwork violations. We believe that the mandatory verification procedures would have imposed an unnecessary burden on the vast majority of good-faith employers, particularly small businesses who do not hire illegal aliens. The effect of such mandatory requirements would have been to penalize the innocent employer rather than the intentional violator.

Mandatory paperwork schemes, such as those contained in H.R. 3080, promote a guilty-until-proven-innocent bias against the business community which the chamber believes to be unjustified. The optional paperwork scheme in S. 1200 places the focus on providing incentives for voluntary compliance. Second, we opposed immigration bills with provisions creating a new private right of action for discrimination based on alienage or which added substantial new antidiscrimination laws as riders to this legislation.

Our principal concern has been to try to target enforcement toward those employers who intentionally hire undocumented workers and to impose strict penalties as needed. At the same time, we sought to minimize the burden on the vast majority of well meaning employers who want to do their part to help solve the illegal immigration problem but who have little contact with undocumented workers. We believe S. 1200 represents a carefully crafted compromise that addresses these concerns, and thus, despite having been a long-time opponent of previous immigration reform bills, we support the Senate legislation.

More than 92 percent of the chambers have fewer than 100 employees, and for that reason we've been particularly sensitive to the potential burdensome impact of various reform proposals on small business owners. S. 1200 effectively addresses our most fundamental objections to the previous employer sanctions provisions.

Just very briefly, the five elements that were important in our reaching this decision were, first——

Mr. **Mazzoli**. Ms. Alexander, I hate to bother you, and I know that we live and die by the 5-minute rule here. I guess maybe, after awhile, we have like an internal clock, but there's really 25 seconds left on your 5 minutes, so I think you really ought to get to the part that—primarily, what we're here for today is to hear about the question of antidiscrimination and the chamber's position on that, so if I could ask you maybe in a couple of minutes if you could sort of summarize the chamber's position on that singular aspect; the rest of it, of course, is part of the record and we appreciate that very much.

Ms. **Alexander**. Fine. OK, if there is one single aspect of this immigration debate that can galvanize and activate both large and small businesses, it certainly is this new, substantive antidiscrimination rider. And H.R. 3080's antidiscrimination provisions are inappropriate for a lot of reasons; part because they empower a new special council, because they create private rights of actions, because they empower third parties, they provide mechanisms which will ensure conflicting interpretations of various statutes, they empower special administrative law judges to issue cease-and-desist orders, impose civil fines, order back-pay awards, and require employers to keep records on every applicant for up to 3 years. We believe these requirements would needlessly be disruptive, redundant and inequitable, and would result in excessive litigation. Furthermore, such provisions would ultimately be disadvantageous to the goal of equal employment and the interests of American citizens. Forcing employers to defend themselves against claims of discrimination in yet another Federal forum, such as H.R. 3080 is advocating, causes chamber members great difficulty.

Additionally, the probability of differing or even conflicting interpretations of civil rights laws will exacerbate the growing difficulties of defending against frivolous claims. We believe that title VII under the Civil Rights Act already provides adequate protections against claims based on national origin discrimination, and, in fact, the filing of these charges is growing.

H.R. 3080, by applying to employers who employ more than 3 persons, would be extending title VII coverage, in one instance, beyond that statute's limitation to employers of 15 or more workers for all other discrimination prohibitions. The passage of this legislation would provide, in effect, greater civil rights to some than others.

In sum, the U.S. Chamber is in search of reasonably sound, practical immigration reform legislation which would clarify our national objective, control our borders, provide an effective method by which all Americans, including the business community, can contribute to the solutions of our immigration problem. H.R. 3080 is not the proper vehicle, in our opinion, to achieve those objectives.

Thank you.

Mr. MAZZOLI. Ms. Alexander, thank you very much.

[The statement of Ms. Alexander follows:]

Statement
# of the
Chamber of Commerce
# of the
United States

ON: IMMIGRATION REFORM

TO: IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE AND THE IMMIGRATION AND REFUGEE POLICY SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE

BY: KATHLEEN S. ALEXANDER

DATE: OCTOBER 9, 1985

The Chamber of Commerce of the United States is the world's largest federation of business companies and associations and is the principal spokesman for the American business community. It represents more than 184,000 companies plus several thousand other organizations, such as local/state chambers of commerce and trade/professional associations.

More than 92 percent of the Chamber's members are small business firms with fewer than 100 employees, 53 percent with fewer than 10 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business--manufacturing, retailing, services, construction, wholesaling, and finance--numbers more than 14,000 members. Yet no one group constitutes as much as 29 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 53 American Chambers of Commerce Abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross section of its members serving on committees, subcommittees and task forces. Currently, some 1,800 business people participate in this process.

STATEMENT
on
IMMIGRATION REFORM
before the
IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW SUBCOMMITTEE
of the
HOUSE JUDICIARY COMMITTEE
and the
IMMIGRATION AND REFUGEE POLICY SUBCOMMITTEE
of the
SENATE JUDICIARY COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Kathleen S. Alexander
October 9, 1985

I. INTRODUCTION

I am Kathleen S. Alexander, Vice President of Personnel Services, Marriott Corporation. Marriott has been a very active member of the Chamber of Commerce of the United States, including serving on its Board of Directors and various labor committees and councils. Accompanying me today are Mark A. de Bernardo, Manager, Labor Law, and Virginia B. Lamp, Labor Relations Attorney. On behalf of the Chamber of Commerce of the United States, our nation's largest business federation, I particularly am pleased to come before you to testify on the issue of immigration reform as embodied in H.R. 3080 and S. 1200. Let me take this opportunity to thank you for allowing the Chamber to testify on this important piece of legislation.

The interest of employers in the immigration issue is diverse. One might say that no single business perspective exists on this issue since much depends on the individual employer's business, the company's physical location and the kinds of workers the business employs.

Nevertheless, businessmen and women have -- as do all Americans -- a common interest in the short-term and long-term implications of borders which are hemorrhaging.

II. IMPORTANCE OF IMMIGRATION REFORM

Although we believe that the United States has not lost its capacity to absorb increasing numbers of immigrants and that it benefits from their presence, the U.S. Chamber recognizes that the time for effective immigration reform has arrived. The massive influx of both legal and illegal immigrants which our nation is experiencing must be addressed effectively by Congress and this Administration. Our nation's ability to control its demographic future is key to retaining the economic and political liberties which we value. The short-term, as well as the long-term, costs of our currently permeable borders are great. These costs are social, economic, political, environmental and cultural. The need for clear, rational and effective immigration reform is apparent to most Americans, particularly to Americans who live in those border states where the problem is both real and pressing.

As you are aware, the U.S. Chamber would prefer a bill without an employer sanctions provision. We recommended and remain committed to an immigration reform bill which effectively would stem the flow of unwanted immigration, without opening up the range of issues (such as methods of enforcement and potential discrimination) resulting from such a provision. Inherent in any legislation which places sanctions at its centerpiece are the inevitable problems associated with discrimination.

Yet Congress appears determined to make employer sanctions the centerpiece of immigration reform. Based on that, the U.S. Chamber recently reconsidered its long-term opposition to Congressional immigration reform legislation and supports the approach taken in the Senate bill, S. 1200. This bill, in particular, with its revised employer sanctions provision, represents an improved approach to employer sanctions. While the Senate bill is not perfect from the Chamber's perspective, it is a tough, fair, political initiative which we can support.

III. HISTORY/BACKGROUND OF U.S. CHAMBER'S POSITION

The Chamber's position on immigration policy was never intended to justify or protect those employers who intentionally hire illegal aliens and take unfair advantage of their status. Rather, it has been to prevent legislation which would do two unnecessary things.

First, the Chamber opposed previous immigration reform bills requiring all employers to comply with overly-burdensome recordkeeping and verification requirements (whereby fines could be imposed for mere paperwork violations). We believe that the mandatory verification procedures would have imposed an unnecessary burden on the vast majority of good-faith employers -- particularly small businesses -- who do not hire illegal aliens. The effect of such mandatory requirements would have been to penalize the innocent employer rather than the intentional violator. Mandatory paperwork schemes, such as those contained in H.R. 3080, promote a "guilty until proven innocent" bias against the business community which the Chamber believes to be unjustified. The optional paperwork scheme in S. 1200 places the focus on providing incentives for voluntary compliance.

Second, we opposed immigration bills with provisions creating a new private right of action for discrimination based on alienage or which added substantial, new anti-discrimination laws as "riders" to this legislation.

Our principal concern has been to try to target enforcement toward those employers who intentionally hire undocumented workers and to impose strict penalties as needed. At the same time, we sought to minimize the burden on the vast majority of well-meaning employers who want to do their part to help solve the illegal immigration problem but who have little contact with undocumented workers.

S. 1200 represents a carefully crafted compromise that addresses these concerns. Thus, despite having been a long-time opponent of previous immigration reform bills, we support the Senate legislation.

IV. REASONS FOR THE CHAMBER'S POSITION ON S. 1200

More than 92 percent of the Chamber's members have fewer than 100 employees. For that reason, we have been particularly sensitive to the potential burdensome impact of the various reform proposals on small business owners. S. 1200 effectively addresses our most fundamental objections to previous employer sanctions provisions. The following five elements of S. 1200 were important in reaching this decision:

- Optional recordkeeping and verification requirements (no penalties for paperwork violations);
- No private right of action creating new rights and/or a new protected class based on alienage (such as the House-passed "Frank Amendment" of 1984);
- A warning period prior to issuance of any sanctions to allow employers an opportunity to become accustomed to the new system;
- Substantial safeguards to protect against abuse of the compliance and investigatory procedure to enforce the employer sanctions; and
- An affirmative defense against charges of knowingly hiring illegal aliens for employers who voluntarily comply.

A. A Strong Incentive to Comply Voluntarily

This legislation would, for the first time, make it illegal under federal law to knowingly hire undocumented workers. However, S. 1200 provides employers with an affirmative defense when they voluntarily choose to comply. By removing mandatory paperwork and recordkeeping requirements, S. 1200 eliminates the potential for technical fines being imposed on well-meaning employers who hire U.S. citizens but who fail to keep records. If the employer elects not to keep records and later is found to have hired illegal aliens, S. 1200 establishes a legal presumption that the employer "knowingly" hired those illegal aliens.

We believe that the vast majority of employers will want to comply with the new verification system, not only to help achieve immigration reform but also to avoid the substantial, although not irrebuttable, presumption which would be invoked against those employers who fail to keep records and who are later found to have hired undocumented aliens unknowingly.

B. Safeguards Against Discrimination Incorporated Specifically into S. 1200

S. 1200 contains specific and important protections if some pattern of discrimination begins to develop.

Section 402 requires the General Accounting Office (GAO) to review and to report to Congress on any pattern of discrimination developing subsequent to enactment of the bill. S. 1200 gives GAO the authority to suggest specific remedies to Congress, and the appropriate Congressional committees must hold hearings on these GAO reports.

In addition, an important task force would be created to include representatives of the U.S. Attorney General, the Chairman of the U.S. Commission on Civil Rights, and the Chairman of the Equal Employment Opportunity Commission. This task force, working with Congress, should be an effective means by which to identify and remedy any discrimination which may result from the new employer sanctions provisions.

V. OTHER AREAS OF SIGNIFICANT CONCERN TO THE CHAMBER

A. Anti-Discrimination "Riders" to Immigration Reform

If one single aspect of the immigration debate can galvanize and activate the business community -- small and large employers alike -- it is the addition of any new, substantive anti-discrimination "riders" to immigration reform.

1. Last Year's Frank Amendment

During last year's House debate on immigration reform, an amendment by Representative Barney Frank was offered that would have created an entirely new enforcement scheme for claims of alienage as well as national origin discrimination. The Frank Amendment would have:

- created a special counsel within the Justice Department to pursue such claims;
- provided a private right of action to persons alleging national origin/alienage discrimination;
- imposed civil fines of up to $4,000 for each individual against whom an employer discriminates;

- permitted suits by illegal aliens, for the first time, as well as U.S. citizens; and
- subjected employers to suits by both the special Council and EEOC based on the same claim of misconduct.

2. H.R. 3080's Anti-Discrimination Provisions

H.R. 3080 would begin where the Frank Amendment left off. It would:

- empower a new special counsel in the Justice Department to file lawsuits;
- create a private right of action for individuals alleging alienage discrimination;
- prohibit employers from limiting job openings exclusively to U.S. citizens, causing employers, in some instances, to deny a job to an American citizen in favor of a foreign national;
- empower third parties with the right to bring an action on behalf of persons claiming discrimination;
- provide a mechanism which will ensure conflicting interpretations of various statutes which prohibit discrimination; and
- empower special Administrative Law Judges to issue "cease-and-desist" orders, impose civil fines, order backpay awards, and require employers to keep records on every applicant for up to three years.

3. A Business Perspective on New Discrimination Laws and Agencies

Rather than attempting to protect employers who are discriminating unlawfully, the Chamber views new anti-discrimination laws in a different light. Congress must be sensitive to the fact that equal employment opportunity (EEO) law has become a highly technical legal specialty. Discrimination charges, generally, are unique for the following reasons:

- overlapping statutes;
- intricate and ever-changing case law development;
- the growing phenomenon of differing definitions of discrimination according to each separate protected group;
- a growing number of federal agencies with jurisdiction, differing agendas or differing interpretations of existing civil rights laws;
- massive discovery, which is frequently involved;
- intense interest and emotion among a work force where a charge is pending;
- tedious and time-consuming efforts to prepare an employer's case
- the cost of litigation which often bears little relation to the amount in issue;
- often an inverse correlation between the strength of a plaintiff's case and the amount of time the plaintiff is willing to spend on it; and
- the expense of counsel, litigation and settlement.

Avoiding or minimizing an employer's exposure to these types of claims involves considerably more than knowing what the law requires and resolving to comply. Advising employers on this subject has become a service which rivals income tax counseling. It may be that future Administrations will be advocating "civil rights simplification," just as we are hearing cries in 1985 for "tax simplification."

Liability frequently is assessed without regard to an employer's good intentions. Achieving compliance with the proposed employer sanctions, building a record to demonstrate that particular compliance, and, especially establishing an adequate record to protect an employer from frivolous or unsubstantiated claims of discrimination are three separate and serious issues with this legislation facing the business community. By far, the most devastating and potentially disruptive is the latter.

Any factual situation can easily involve technicalities that must be monitored if the employer is to avoid equal employment opportunity problems. Forcing employers to defend themselves against claims of discrimination in yet another federal forum, such as H.R. 3080 is advocating, causes Chamber members serious problems. Additionally, the probability of differing or even conflicting interpretations of civil rights laws will exacerbate the growing difficulties of defending against frivolous claims.

4. Issues Involved With Altering Existing Law

a. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act already provides adequate protections against claims based on national origin discrimination. In fact, the filing of these charges is growing. (See table below.)

H.R. 3080, by applying to employers who employ more than three persons, would be extending Title VII's coverage in one instance beyond that statute's limitation to employers of fifteen or more workers for all other discrimination prohibitions. Passage of this legislation would provide, in effect, greater civil rights to some than others. And, more importantly, U.S. citizens would be the losers in the expansion envisioned by H.R. 3080.

As recently as September 9, 1985, INS Commissioner Alan Nelson, on page 7 of his testimony before this Committee, stated that the "Administration believes that new provisions in H.R. 3080 relating to potential employment discrimination are not needed, due to the extensive protection provided by Title VII of the Civil Rights Act of 1964, as well as other state and local prohibitions against employment discrimination."

Additionally, the New York Times, in a September 10, 1985, story on the same hearing, quoted Attorney General Edwin Meese III:

> "We endorse the spirit of those provisions, but not the specific mechanisms," Mr. Meese said. "We see them as unnecessary and undesirable." Further, he said, "We feel that the present law is adequate" to protect the rights of legal aliens and that a "new bureaucracy" is not needed. He said this element of the Rodino bill, if approved by Congress, might lead to a Presidential veto.

CHARGES FILED WITH THE EEOC BASED ON NATIONAL ORIGIN DISCRIMINATION: 1975 - 1984

	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984
National Totals:	6,473	10,622	9,182	7,539	7,913	8,568	9,245	8,738	10,793	10,895
Selected States:										
California	1,215	1,846	1,822	1,749	1,476	1,584	1,350	1,386	1,903	1,844
Florida	157	428	275	225	208	254	332	310	436	495
Texas	1,387	2,048	1,900	1,105	1,136	1,402	1,411	1,439	1,991	1,929
Virginia	18	43	37	34	53	73	65	83	118	79

*Source: Annual Reports (1975 - 1984), Equal Employment Opportunity Commission.

b. Overruling Espinoza

In Espinoza v. Farah Manufacturing, the U.S. Supreme Court held that employers were permitted under Title VII to restrict job openings to U.S. citizens only. H.R. 3080 would reverse that management prerogative.

c. Overlapping Statutes and Agencies

While efforts have been made to alleviate conflicting jurisdictions, H.R. 3080 continues to bring a new federal agency into the business of discrimination charge processing. Different agencies have had differing enforcement policies, different interpretations of existing law, and different levels of efficiency to provide expeditious claim-processing.

B. Undocumented Workers, Not Business, Should Bear Additional Responsibilities

Congress has been quick to propose added responsibilities for the business community in the enforcement of immigration laws. For business to bear the sole burden is inequitable and less effective than other possible approaches. Undocumented aliens are lawbreakers, yet the penalties in current immigration legislation apply exclusively to an employer who, knowingly or unknowingly, hires an individual who wants to work but is later discovered to be an illegal alien. Sanctions have been provided to discourage employers from hiring illegal aliens. Unfortunately, the bills, as well as current law, contain inadequate penalties to deter the undocumented worker.

Employment opportunities play a role in attracting illegal immigrants to the United States. To this extent, employer sanctions are one way to reduce the "pull" provided by our economic system.

Another way to reduce that "pull" is to take a more international and visionary perspective toward the issue of immigration reform.

The reason people of all nations flock to our shores is that America is the freest nation in the world. Here, true opportunity for advancement exists. That is not true in many other nations where high taxes, overregulation, oversized governments and lack of personal freedoms have smothered the possibilities for advancement and self-betterment of their people. In the long run, convincing the nations of Latin America and elsewhere to free their economies, respect private property rights, and sell inefficient government-owned companies will do more to slow immigration than any fence along the Rio Grande or any regulation of American hiring practices

To this end, the Administration proposed and Congress passed funding for the National Endowment for Democracy. The Center for International Private Enterprise, funded by NED, works to promote free markets and strong business climates in nations throughout the world. It explains the simple truth that low taxes, less regulation, and a free economy are the route to growth and opportunity.

Therefore, the potential for aliens to receive economic, social, political and other benefits is a significant "pull factor," yet it goes largely unaddressed by sponsors of immigration reform measures. We believe that the penalties and responsibilities of breaking immigration laws should be shared by the undocumented, knowing violator of our nation's existing immigration laws. After all, what we need is an immigration policy which establishes a sufficient level of control -- while maintaining maximum economic and political liberty -- to deter would-be violators of the immigration law. Deterrence measures can be targeted at the business community but also must be targeted at the principal lawbreaker involved -- the undocumented worker.

Further, we need to provide better support and funding for those agencies responsible for policing our borders.

VI. SUMMARY

In sum, the U.S. Chamber is in search of reasonably sound, practical immigration reform legislation which would clarify our national objectives, control our borders, and provide an effective method by which all Americans -- including the business community -- can contribute to the solutions for our immigration problems. H.R. 3080 is not the proper vehicle, in our judgment to achieve those objectives.

Thank you.

Mr. MAZZOLI. Mr. Choate.

Mr. CHOATE. Mr. Mazzoli, I'll submit my testimony and just cut to the nitty-gritty of it.

Mr. MAZZOLI. Thank you. It will be made a part of the record.

Mr. CHOATE. First of all, I realize the committee is, at this point, probably the preeminent experts on the questions of legal immigration. It's a humbling thought, as a witness. Certainly, the country needs immigration reform. Clearly employer sanctions are required. They must be hard, they must be tough, they must be serious; no reform will work unless we have that.

Employer sanctions have been supported by NAM for several years and continues to be supported. There are some troubling aspects of the topic under discussion this morning, however.

The first question is: What is wrong with American employers giving American citizens a preference for jobs over foreign aliens?

I find such a course to be eminently sensible. We're in troubling economic times. The Department of Labor indicates that 2 million jobs a year are disappearing in the United States. As we go through these great industrial transitions, as we go into recessions, we're going to have even more of this. If an American citizen is displaced from a job by a foreign citizen, they find themselves with no preference and no equal rights for employment when they go to another country. That's a troubling circumstance to me.

By putting a premium on citizenship, I do think that we speed the process for people to decide whether or not they wish to become a U.S. citizen. Citizenship should convey certain privileges with it.

Above and beyond that, however, from the prior testimony and from other materials that I have read, there does seem to be a lack of information about whether or not there has been discrimination on the basis of alienage. There may well be, there may not be. I think, however, before we have a change of policy that says that we're going to prohibit American employers from giving preference to American citizens, that we need much better information. The provisions in the Senate bill that would have a study is a prudent and commonsense way to gather facts and then make a determination if we're going to need a change national policy.

Finally, if it is going to be national policy that American employers can no longer give a preference to American citizens, it is a troubling aspect to think about creating another Federal agency to deal with the question. The history of Federal agencies, so far, has been one added on top of another, and inevitably, as you have more people involved in the decisionmaking, it becomes more burdensome on employers and, in many cases, perhaps less efficacious for those that are affected.

So, what I would urge is that the Congress not put American employers in the clammy grasp of yet another Federal regulatory agency. If this is to pass, rather than creating a new Federal regulatory agency, please make those which exist work well. Thank you.

[The statement of Mr. Choate follows:]

TESTIMONY

OF

PAT CHOATE
DIRECTOR, POLICY ANALYSIS
TRW INC.

ON BEHALF OF

THE NATIONAL ASSOCIATION OF MANUFACTURERS

ON

H.R. 3080
"IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS ACT
OF 1985"

BEFORE

HOUSE SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND INTERNATIONAL LAW

OCTOBER 9, 1985

Mr. Chairman and members of the Subcommittee, I am Pat Choate, Director, Policy Analysis for TRW Inc. I am here today on behalf of the National Association of Manufacturers' 13,600 corporate members, which include manufacturers of every size and industrial class located in every state. Members range in size from the very large to over 9,000 smaller manufacturing firms, each with an employee base of less than 500. NAM members employ 85 percent of the workers in manufacturing employment and produce more than 80 percent of the workers in manufacturing employment and produce more than 80 percent of the nation's manufactured goods. Through the NAM's National Industrial Council and Associations' Council, the NAM is affiliated with an additional 158,000 employers.

On behalf the NAM members, I would like to thank you for the opportunity to testify on the issue of national origin and citizenship status discrimination and related enforcement measures as contained in H.R. 3080.

Testimony Summary

The NAM for the past several years has worked with Congress to ensure passage of a fair and balanced immigration reform bill. We cannot as a nation continue to ignore the increasing numbers of illegal aliens flowing into our country. The social and economic problems endemic to a society where as many as 500,000 illegal aliens flow over the borders each year warrant decisive legislative measures.

The United States is one of the most generous countries in the world in opening its doors to legal immigrants. But unfortunately the lure of jobs and opportunity make this nation all too appealing to thousands and thousands of aliens, who chose not to pursue legal channels for entering this country. Mr. Chairman, we applaud your efforts to tackle this difficult national problem. While we endorse the intent of H.R. 3080 to limit the flow of illegal aliens, there is a major provision which troubles industry. That is the provision prohibiting employers from giving hiring preference to U.S. citizens and creating a new civil rights enforcement agency to enforce immigration law violations.

II. Creation of New Form of Discrimination and Immigration Board

The proposed bill continues a trend by government to place unnecessary constraints on employers to exercise freedom of choice in the selection of employees. In the case of H.R. 3080, employers would be restrained from exercising the choice to select American citizens for American jobs. At a time of great concern over the loss of American jobs to competition from abroad, Americans now would be faced with Government-mandated competition from non-U.S. citizens here at home. Turning to the specific provision of H.R. 3080, I would like to address the concept of establishing a new form of discrimination, "citizenship status" and the creation of a new regulatory process. Under the "citizenship status" provision, S274B (a)(1)(B) of H.R. 3080, two types of persons are protected, U.S. citizens and "intending citizens", i.e. resident aliens and other categories of aliens fulfilling certain conditions.

Both U.S. citizens and resident aliens currently are readily able to produce documents attesting to their right to work, and, consequently, seem unlikely to be the object of employment discrimination. Presumably the concern, then, is that the remaining types of intending citizens are somehow likely to be victims of citizenship status discrimination. If they are the victims of such discrimination, then it is difficult to conceive circumstances under which they would not concurrently be the victims of national origin discrimination. Since national origin discrimination is already the subject of protection under existing law, such redundant enforcement is unnecessary.

Existing and prospective limitations on the ability of non-U.S. citizens to obtain employment are, by and large, not the result of actions of individual employers but rather the result of the Government's own policies, present and prospective. The most notable example, apart from INS restrictions, is U.S. Government security requirements which now drastically limit the ability of non-U.S. citizens, including resident aliens, to obtain security clearances required for employment in many defense industry positions. Further, separately from pure security clearance requirements, many U.S. government contracts restrict access to contract data to U.S. citizens only. Employers who must comply with security constraints face an additional problem. Most such employers have both Government contract and non-Government contract business. Under the present proposal, the non-government contracting units of such an employer would not have the ability to limit hiring to U.S. citizens. However, promotional opportunities for non-U.S. citizens hired in such a case would be limited by security constraints applicable to the government contracting business. The employer, as a result of statutory mandate, would be establishing a form of segregated employment.

All of the aforementioned effects on employability of both U.S. and non-U.S. citizens emanate, not from employer actions, but from Government actions including the proposed legislation now under consideration. In light of that fact, I believe the nployer community can justifiably object to the imposition of a set of costly regulatory constraints designed to cope with the unintended side effects of the Government's own actions.

In addition to the problems posed for companies in the defense industry, many other businesses choose as a policy to hire only U.S. citizens. This type of preference was upheld by the U.S. Supreme Court last year in Espinoza v. Farah Manufacturing, 44 U.S. 86, which held that under Title VII of the Civil Rights Act employers are permitted to restrict job openings to U.S. citizens only. Countries throughout the world endorse laws giving priority status to their own citizens. Particularly during times of high unemployment, there seems to be nothing abhorrent about policies giving job preferences to those applicants who are U.S. citizens. This does not discriminate against any ethnic group or race. Rather, it serves as an incentive for immigrants to move rapidly to become U.S. citizens. We should continue to foster this type of policy.

The particular form of regulatory mechanism proposed is also objectionable. First, yet another regulatory body in the field of employment discrimination law is simply unnecessary.

Second, including national origin discrimination in yet another regulatory environment duplicates existing federal law as well as statutes of numerous states already prohibiting national origin discrimination. Adding yet another prohibition with an additional enforcement mechanism is simply redundant. Imposing additional administrative costs on both the Government and employers provides no visible gains, since potential victims of national origin discrimination already have an equivalent level of protection under existing laws. Third, the procedures proposed appear likely to lead to a greater number of formal trial-like proceedings than under current equal employment enforcement mechanisms where much greater emphasis is placed on the investigatory and conciliatory steps. The cost of compliance with regulatory measures the employment area is well recognized. The present proposal would add yet another regulatory layer to be interpreted by lawyers, administered by more professional staff, investigated by additional government employees and disputed by more lawyers. The imposition of such additional costs is not justified by the nebulous, hypothetical results presumably envisioned. A much better approach to concerns of potential discrimination resulting from employer penalties was proposed by Senator Edward Kennedy, D-MA, and adopted by the Senate in its final bill. The Kennedy proposal mandates that the General Accounting Office assess any potential discrimination after the bill has been in effect for three years. If it is found that discrimination has resulted, the Congress will remove the penalties against employers for hiring illegal aliens. Employers believe it would be ill-advised to create a new form of discrimination without any knowledge that it will be necessary or beneficial for U.S. citizens. However, it certainly would be proper for Congress to review the impact of employer penalties after a three-year test period. We are optimistic that the GAO will not find wide-spread discrimination against minorities, and none that cannot be remedied through our current civil rights laws.

III. Summary

In summary, NAM will continue to support immigration reform efforts. The changes we propose in H.R. 3080, NAM believes will make it a better bill, one which industry can support. We should not as a nation strip employers of the right to give hiring priority to U.S. citizens. Industry stands ready to participate, in conjunction with all sectors of our society, to ensure that our immigration laws are workable, enforceable and effective.

Mr. **Mazzoli.** Thank you very much. You limited your time; we appreciate that very much.

I'll now yield myself 5 minutes to start the round of questioning.

I appreciate this panel. I think it is kind of interesting, that you represent the real nub of this problem: On the one hand, the profound philosophical question, is it wrong to discriminate against non-U.S. citizens, you know, just to ask that simple question, should not U.S. citizens be preferred, is it wrong to necessarily put them in an equal posture with a non-U.S. person for a job; and I think, then, Ms. Alexander talking about the details, the forum shopping, the fact that you'll have special councils, that you'll have multiple remedies, the paperwork burden. So I think, really, this is a good panel from the standpoint that it's really put us in there.

And let me just begin, Mr. Choate with you, again, on that very profound but simple question: Should American citizens be preferred in the workplace, so to speak? Are you troubled by a bill which, on the one hand, would say to some people:

> You've been here a long time, you've worked hard, you've kept yourself out of legal trouble, other than the fact you entered this country illegally, so we believe that you're the kind that ought to be given a chance, first, to legalize your status, and then maybe work toward citizenship?

So, are you troubled at all by the fact that an intending citizen, a person who has survived this individual scrutiny and has indicated that he or she wants to be a citizen, is then, when they go to get a job, maybe would suffer discrimination because a U.S. person would get in there first? Are you troubled at all by that? Does that bother you, really?

Mr. **Choate.** No; it doesn't, to be quite honest. I think that what that does is put a premium on citizenship. It makes citizenship something desirable.

Mr. **Mazzoli.** So the idea that that would put this intending citizen more quickly on the road to citizenship, that person would not delay in filing the papers, would move quickly, and so is that the idea?

Mr. **Choate.** I think it will wonderfully concentrate people's minds about the objective. I think it also, to be quite honest about it, addresses the question of having people change their minds about whether or not they wish to be a citizen.

Mr. **Mazzoli.** Let me ask you this. One of the objections that I've heard to the Frank language along the way, is that employers are in the business of making money.

Mr. **Choate.** Hopefully.

Mr. **Mazzoli.** Well, that's right, that's the idea.

Ms. **Alexander.** Everyday.

Mr. **Mazzoli.** Some of them don't; not because they don't want to, it's because they really can't.

But the idea is that there will be—and maybe the reason we have little information about whether or not there's alienage discrimination currently, because we have millions of non-full-fledged citizens in this country now legally, but apparently there is a fairly scant amount of information on just exactly what experiences they have in the workplace. Some say it's because if you're a good worker, and you have the talent, no employer who wants to make a buck is going to discriminate against some person just because they're not a citizen. If they can do the job and they have the qualifications, and they're willing to go out there and hump, they'll get a job.

From the NAM's standpoint, how do you see that?

Mr. **Choate**. I think that's the case. However, you know, I would again argue the point, if a particular employer, for whatever reason—patriotic reasons or business reasons—says that they really prefer to hire American citizens, I don't think that right should be taken away.

Mr. **Mazzoli**. You don't think that maybe somebody could use that as a guise or a ruse to really achieve perhaps a less elevating and elevated agenda?

Mr. **Choate**. I think that there are certainly enough other laws on the books, as we've heard in the discussion earlier this morning, that those kinds of nefarious schemes could be ferreted out, and there are remedies that deal with that.

Mr. **Mazzoli**. Thank you.

Ms. Alexander, with what little bit of my time is remaining, let me ask you this. You brought up very clearly the chamber's position on the whole snarl of paperwork with respect to employer sanctions, and then, furthermore, the burdens that might ensue to a smaller employer on this whole question of discrimination. You know, I've heard the argument said that sometimes protecting our constitutional right or protecting a right that's given in this great Nation of ours is worth the problem. I mean, the fact is that we in this Nation do spend an inordinate amount of time protecting rights, but that's what makes us the great nation and that's why we're better than a Russia, we're better than another nation.

Do you see that this might fit in that category, that this is one situation where we have to be submitting to a more complicated system in order to continue the beauty of this Nation as a haven for people as a place where they can reach their potential?

Ms. **Alexander**. In terms of the recordkeeping aspect of it, I think the chamber has felt very comfortable with the Senate bill 1200. That is a good balance that allows the employer, if they feel that it is going to be unduly burdensome for them to keep the paperwork, that they are allowed the freedom to take that risk inherent in not keeping the paperwork and later being found to hire an illegal alien. Most prudent employers who have the resources will probably keep those records and ask them of all applicants, and, therefore, have an affirmative defense. I think that affirmative defense is a sound portion of our support.

Mr. **Mazzoli**. My time has expired.

The gentleman from Wyoming.

Senator **Simpson**. Thank you, Mr. Chairman.

Let me just ask, with the diversity of the chamber throughout the United States and dealing with the various States, let me ask Ms. Alexander: To what extent do some State antidiscrimination laws provide coverage of national origin discrimination which title VII does not cover?

Ms. **Alexander**. That brings up a very valid and good point, and that is that most State, and, we should not forget, county, and local city ordinances which cover national origin discrimination usually have a wider coverage than the Federal statute; that is they reach down to employers with five or four employees. And, therefore, those are avenues that individuals may use for redress, even though they may not be covered under title VII in terms of the jurisdictional number of employees.

Senator SIMPSON. I think I want to have it in the record that we do require, in the Senate bill, the GAO to monitor and report to the Attorney General, and the Chairman of the EEOC, and the Chairman of the Civil Rights Commission on, "discrimination," resulting from employer sanctions, which, if this is part of it, that would certainly be part of the report. And I just wanted to have that in there. That is the reality.

And then, of course, the even greater reality in the Senate version—and I hope the House will respectfully take a good look at what we did—that the occurrence of widespread discrimination caused solely by employer sanctions will trigger the demise of the whole operation. That was in deference to the things that came out in the conference committee, and it was a very good debate. It's too bad that wasn't recorded somewhere on the conference, as to what we talked about there.

But I guess, in my experience, then, I have a question. As an employer and as one who represented many employers, it seems to me that employers look for reasons to hire good employees, they don't search for reasons not to hire employees who can do the job.

Now, perhaps that comes up in the area of promotion and later in the employment chain, but it doesn't come at initial hire. So, I'm always fascinated anew about that issue, because this does not cover the chain of employment. We're only talking about new hire; and discrimination comes at all stages of employment.

The House's provision covers national origin in every case that title VII does not, except for employers of three or fewer, and that's been brought up here. That gives an additional coverage to all temporary employees who work less than 20 weeks in 1 year, and that was adeptly covered with regard to agriculture by Howard Berman. Title VII covers employers of 15 or more employees who work more than 20 weeks of the year.

On the surface, it seems to me that H.R. 3080 covers national origin discrimination for employers of 4 to 14 in order not to overlap with title VII; however, I have been informed by members of the business community that the coverage is not limited in exactly that manner, particularly with regard to temporary employment.

Would you please elaborate on some of those concerns?

Ms. ALEXANDER. I'm not sure I understand your question, Senator.

Senator SIMPSON. Well, we have this present coverage. The House version says that besides creating this new and prohibitive form of discrimination based on alienage, the House bill makes a drastic change in EEOC coverage of national origin discrimination. Present coverage is 15 or more employees, each of whom has worked at least 20 weeks of the year. H.R. 3080 says 4 or more employees with no requirement that each work at least 20 weeks per year, unless, of course, there are 15 or more employees.

I ask you about the concerns in the employment community about that kind of thing.

Ms. ALEXANDER. Well, certainly if you expand coverage to persons who may work for only 1 week and then quit, or disappear and not show up for work again, and you limit it to smaller employers of only three or four employees in a given time, those employers are just the very ones, many of them, who are least capable of being able to afford both the time and the expense it takes to appear before an administrative body and, possibly, a judicial one later down the road, to defend their case, no matter how nonmeritorious the original charge is. It does have an economic impact.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman from Massachusetts.

Mr. FRANK. Mr. Chairman, one of my problems here is that my colleague, the Senator from Wyoming, and some others, when we were talking about the argument that employers only want to hire good people to make money, and, therefore, we don't need this, that applies, of course, equally to race, sex, and religion. So, that's an argument that proves, I would hope, far too much even from those who make it; that is, if we are going to accept that we don't need any antiemployment discrimination because employers only want to maximize their income, it's not just this that we don't need, we don't need it against race, religion, or anything else. And I would say, I think the chamber's probably been consistent in that.

Ms. Alexander, you said that the chamber likes title VII. What was the chamber's position on the original title VII and on the additions of sex and age? Did the chamber support those enactments when they came?

Ms. ALEXANDER. If I'm correct—Mark, correct me if I'm wrong—we did not support the original version.

Mr. FRANK. Thank you.

Ms. ALEXANDER. However, we feel that this——

Mr. FRANK. That's all right, I only have 5 minutes.

In other words, you see, we have this pattern here where whenever people who are opposed to discrimination come up with a remedy, you people oppose it, then, once your stuck with it, lest we do something further, you retroactively adopt it. And I think the chamber's position has been consistent, it's the one that was articulated: You just want to make money—which is what business ought to do and I'm glad business does it, and I wish business could do it more, and I want to help—but you don't want to be told not to discriminate. And you weren't in favor of it in race, and you weren't in favor of it with sex, and you weren't in favor of it with age, and you wouldn't be in favor of it any other way.

The second question I'd like to ask is with regard to this rather peculiar concept that it's apparently OK to discriminate against someone if the status can change. A couple of my colleagues have said this, except that they keep saying, "Of course, religion might be an exception." Let's be very clear, religion is not a "might be" exception; as I read the first amendment, religion is an exception to that, I think, strange notion, I must tell you, that it's OK to discriminate against a status that is voluntary.

Every antidiscrimination statute that I am aware of says you can't discriminate based on religion. And religion is changeable:

You may change your religion, you may go from one to the other, you may go to none whatsoever.

And that's right, gentlemen, you may have two religions, there are people like that. [Laughter.]

The fact is that the argument that you can't do that, I mean the argument that we're doing something new when we deal with a status that can be changed is simply wrong. As a matter of fact, it is easier to change your religion than it is to change your citizenship in some ways, because I don't know of any 5-year waiting list before taking a religion and I don't know of any church that's as ill-staffed as the Immigration Service to give you a test to change it. So, that argument just doesn't make any sense.

Now, the last point that I want to talk about to Mr. Choate is, when you said "we want to give an incentive for people to become citizens," and I was struck when you said, "It will concentrate their minds wonderfully." Of course, that was used originally with regard to execution, and it's an interesting simile. [Laughter.]

It's interesting that that would occur to you in this context. But how does it make them go quicker? The fact is that under the bill that is before us now—and it is going to be criticized by some of our colleagues later who think it's too soft—if you are eligible for citizenship and haven't sought it, you lose the protection; so would you tell me how it works as an incentive?

If you are not yet eligible for citizenship, you get this; and the day you become eligible, if you haven't acted to become a citizen, if you haven't begun the process you lose it. So, how does it give you an incentive to get something you're not eligible for? Is it an incentive to forge documents, claim you were here longer? How does that work?

Mr. CHOATE. It makes the citizenship more valuable.

Mr. FRANK. No, no. I didn't ask if it was more valuable; but how is it an incentive?

The day you become eligible for citizenship and don't try to get it, you lose the protection. So tell me, then, how it is an incentive for you to become a citizen.

Mr. CHOATE. You would, I think, as an applicant try to get that eligibility quicker.

Mr. FRANK. No, but I don't think you understand the procedure. In fact, I think we're giving people more incentive, because we're saying if you're working on the process to protect yourself during the time it takes you to get it, you know you could be here for 5 years and you could apply. We have backups down from California. Mr. Lungren has been very diligent trying to help the people in his area get better service from INS. There are long backlogs of 1 year and more. It's not the INS's fault, we don't give them enough money.

So, I don't understand how it is more of an incentive; do they jump to the head of the line?

Mr. CHOATE. No.

Mr. FRANK. I think what happened was, somebody drafted this for last year's bill and didn't get around to changing it, because it doesn't make any sense in the context of this year's bill.

When we say to people that, "You can have this protection only as long as you are doing everything possible to become a citizen, and the day that it is possible for you to become a citizen, or week, and you haven't initiated that process, you lose it," I don't see how you can make your incentive argument.

Mr. CHOATE. Well, I think you would pursue that eligibility quicker. I mean, I just came back——

Mr. FRANK. You can't pursue it quicker. The law says so many years.

How would you do it quicker?

Mr. CHOATE. Well, I think you would get into the line, but I come back to the basic question——

Mr. FRANK. But if you don't get into the line you'll lose it. Now, don't get off the question I'm asking.

Mr. CHOATE. OK.

Mr. FRANK. When somebody else asks you a question, get on that one.

Mr. CHOATE. All right.

Mr. FRANK. How can you do it quicker if you get off the line? If you don't get on the line you lose it, so how is this an incentive? If it says that you move as quickly as possible to become a citizen or you lose it, how is it an incentive to make you move quicker?

If she wants to answer, it's OK.

Mr. CHOATE. Yes, Sharon.

Ms. SPIGELMYER. I think that a lot of people live here 20 years and never become citizens.

Mr. FRANK. Then they lose the protection.

Please read the bill.

Mr. SPIGELMYER. I think that it says when you become an intending citizen you become covered.

Mr. FRANK. No. You haven't read it.

And I thank you for letting her testify, because it clears up my point.

I ask 30 additional seconds of the chairman.

The fact is, I know we've had two different names on the testimony. You've got last year's bill that you're talking about. Yes, in the original form of the amendment as it passed the House, before we had the compromising conference, it would have covered you if you had been here 106 years and never tried; but that's wrong. People who have been here for 20 years, they would not be covered by this; because you have passed the eligibility date under the bill and have not tried to become a citizen, it doesn't cover you. So, I think that you just got it wrong.

Mr. CHOATE. Mr. Frank, the basic point that I was making is, we think it should be citizens. There should be no prohibition. You understand my point.

Mr. MAZZOLI. The gentleman's time has expired.

Mr. FRANK. Yes, your point is you should be able to do whatever you want and not have any antidiscrimination laws about anything.

Mr. CHOATE. That is not it.

Mr. MAZZOLI. The gentleman from California is recognized.

Mr. LUNGREN. I appreciate the last exchange. It's just interesting that the gentleman from Massachusetts indicates that I guess we shouldn't pay much attention to the testimony of the people before us who represent the chamber, because they haven't supported title VII. I hope the gentleman wouldn't accept the argument that because many of the people who supported the Frank amendment and continue to support the Frank amendment in the House have never supported the bill and have voted against the bill, we ought not to consider their feelings with respect to the Frank amendment.

I mean, I think what we ought to do is go to the question of the merits of this. There is a difference between classifications of religion in this situation and classifications for citizenship. We don't want to encourage, by Government action, people to change religion. What I think we do want to do is have people change their status from noncitizen to citizen, and the more valuable you make the citizenship, it seems to me, the more encouragement that you place there.

Now, the gentleman says we're only going to cover intended citizens. That's true, but I don't think the gentleman would suggest that we give intending citizens the right to vote prior to citizenship. Citizenship is, in and of itself, unique, and it seems to me there is some disconnection between comparing a religion or sex with citizen status.

Mr. **Frank**. Would the gentleman yield?

Mr. **Lungren**. At least still in my State it's tougher to change sex than it is to change your religion for a status.

Mr. **Frank**. Would the gentleman yield?

And more fun.

Mr. **Lungren**. Well, the gentleman had 5 minutes, so let me just go on.

The other thing that I wonder is, in this expansion of coverage that some have suggested here, they evidently want to make sure that we cover farm workers against discrimination for being noncitizens. I would like to see the record show where there is any discrimination against noncitizens in agriculture precisely because they are noncitizens. If that were the case——

Mr. **Berman**. Would the gentleman yield?

Mr. **Lungren** [continuing]. We wouldn't be working for a guest worker program, we wouldn't be working on this entirely; because the question seems to me to be the fact that we have enormous numbers of people who are noncitizens and here illegally who are working in agriculture, and I don't see any basis for the grounds of discrimination against someone in agriculture because he or she is a noncitizen. National origin is something different, and that is covered and not necessary under here.

The gentleman wants me to yield?

Mr. **Berman**. Yes; my whole point was, only dealing with national origin for a huge number of agricultural employers, they are not covered because they do not employ more than 15 people a year for 20 weeks a year, even though they employ hundreds of people at their peak season.

Mr. **Lungren**. I appreciate the gentleman's comments. Then what the gentleman is indicating is he wants to change title VII vis-a-vis this bill. We ought to change title VII if that's the way the gentleman feels, but ought not to use this vehicle for doing that.

I again would say that I don't know any allegation of discrimination against agricultural workers in California or any other place because of their noncitizenship status.

Mr. **Berman**. No one has made that allegation.

Mr. **Lungren**. In fact, the facts are entirely different.

Mr. **Berman**. No one has made that allegation.

Mr. **Lungren**. Well, the gentleman is establishing a remedy for a problem that doesn't exist then.

I would like to ask the panel this; that is, if we accept the Frank amendment, evidently there is consent, or at least this is what I got out of the discussion we had during the conference last time, that in certain circumstances you make exceptions. As everyone knows, in many circumstances, for Defense Department contracts you need to have citizens working.

Now, my question is this: Can you tell us how we could articulate a proper exception not only for companies that presently have contracts with defense contractors but those companies who intend to get in a position so that they can bid on defense contracts?

And my point is this: At what point in time do you determine that in good faith a company is attempting to try and put themselves in a position of getting a defense contract if they've never had a defense contract in the past, and if they want a defense contract in the future they don't want to rely on employees who are noncitizens who will, then, not be able to work for them when they get the contract?

Have any of you tried to figure out the proper exception that we could create to the Frank amendment to get over that problem, Mr. Choate and Ms. Alexander?

Mr. **Choate**. No; we haven't, but it would appear to me to be an almost insurmountable maze or obstacle that one would have to leap to do that.

Ms. **Alexander**. I offhand can't think of how it could be done, really.

Mr. **Lungren**. My point is, as much as this idea may, in general, be a good idea, if you accept the position that we've got circumstances in which we've got to be citizens in order to get a contract with the Government, I don't know how in God's name we're going to be able to create an exception that takes into consideration good faith attempts of companies who try and get in that position. And we may have the absurd position of having a special counsel which, if it goes under present law, would be required to hire only citizens to prosecute the cases against a company that has hired somebody as a citizen over a noncitizen, following the same hiring practices that the special prosecutor would follow, or special counsel would follow, pursuant to Federal law, and I don't know anything more absurd than that.

Thank you, Mr. Chairman.

Mr. **Mazzoli**. The gentleman's time has expired.

The gentleman from Illinois, Senator Simon, is recognized for 5 minutes.

Senator **Simon**. Thank you, Mr. Chairman.

First of all, I'm familiar with the Senate bill, not that familiar with the House bill. In the Senate bill we do create a period of limbo between the application of employer sanctions and legalization, the new word for amnesty. And I think that does create a problem.

Our colleague from California suggested that this would provide an incentive to citizenship. I don't really think we need any such encouragement. Let me just take a theoretical case—and I'd be happy to hear from any of you on this, and I realize that what, in fact, happens is a little more sophisticated than this. But let's just say that Howard Berman Co., Inc. puts an ad in the paper and says, "We need 40 employees. We will pay American citizens $5 an hour, and we will pay those who are not citizens $4 an hour." Now, I don't know that anyone is going to put an ad like that in. But we do know that there is differentiation between the American workers and non-American workers in the agriculture industry.

Does that differentiation of $5 and $4 offend you? Is that something we ought to be encouraging, regardless of whether it's that sophisticated or less sophisticated?

I'd be interested in any response you might have.

Ms. ALEXANDER. I think you could make a good national origin wage discrimination case out of that and file it under title VII. Because of the purpose or effect of that act, I think the EEOC would probably interpret that action as having a more disparate impact on a particular national origin group and file it under title VII.

Senator SIMON. Let's say here's a man named José Lopez, and here's another named Gomez, both of the same national origin. One is a citizen, one is not a citizen. This company says, "I'll pay $5 to the American citizen, but we'll pay you $4 since you're not an American citizen."

Ms. ALEXANDER. The presence of Hispanics with citizenship in the work force doesn't necessarily preclude a case of discrimination being filed against a Hispanic who is not a citizen.

Senator SIMON. It doesn't need to be Hispanic, it could be anybody.

Ms. ALEXANDER. Any.

Senator SIMON. But the point is the noncitizen, under this kind of situation, at least in the Senate bill, is in limbo, and it does seem to me something ought to be done to protect those people.

Ms. ALEXANDER. I believe that the protection would be there under title VII.

Senator SIMON. You think that the noncitizen is protected right now.

Ms. ALEXANDER. For the most part, yes.

Senator SIMON. For the most part.

Ms. ALEXANDER. I'm not aware of every situation, but I do know that most alienage issues are confused with national origin issues, and a case such as you've cited, the Commission would probably look, first of all, to see whether the impact of that decision, even though you state that it's citizenship only, has an actual disparate impact on a group of persons whose national origin tends to make them more likely to be noncitizens.

I'm not stating that very clearly. The Commission would take a look at that and see what the impact is, and if the group of noncitizens most affected is made up heavily of one national origin group over another, that group is probably protected and I'm sure the Commission would take that charge.

Senator **Simon**. Mr. Choate.

Mr. **Choate**. I would divide it into two parts. I think the most fundamental question is, Should the employer have the right to give a preference to the American citizen for the job? And I would say, "Yes, they should have that right to give a preference to an American citizen."

As to the second question of differential wages, it would seem to me that that really begins to merge into the whole question of labor practices issues that could concern the National Labor Relations Board or other bodies.

And here, again, it seems to me to raise a whole jumble of questions, and that's why I find so very attractive the provision in the Senate bill to require the GAO to do a study. If these kinds of cases do emerge, there may be a need for provisions on national origin to eliminate such discrimination.

Mr. **Mazzoli**. I'm sorry, the gentleman's time has expired.

The gentleman from Wisconsin is recognized.

Mr. **Sensenbrenner**. Thank you very much, Mr. Chairman.

In my questions to the previous panel, I expressed my concern that procedural due process is not being complied with under the terms of the Frank amendment. And we also apply "different strokes for different folks." For example, the person who claims that they are discriminated against because they're black, because they're a woman, because they're of Eastern European origin, or because they're, say, 62 years old, has less broad coverage and fewer rights than a person who claims to be a victim of discrimination based upon alienage.

Now, I have the language of the Frank amendment contained in H.R. 3080 in front of me. And there is an inconsistency in the drafting, in that alienage is not required to be shown in the case of a national origin complaint under the Frank amendment, but is required to be shown in the case of a citizen, or intending citizen as defined by the bill.

Now, the effect of this is that someone, for example, who does not apply for amnesty or legalization under bill would be able to file a Frank amendment complaint based upon the fact that, say, he is of Mexican or El Salvadoran origin, without having to make application for becoming a citizen. There is no limitation on that, no requirement of filing of an application for citizenship or naturalization; it is just somewhat open ended.

Have the legal departments of either the chamber or the NAM looked into equal protection problems that this raises?

Ms. **Spigelmyer**. Well, I think it would be more likely to happen the way Senator Simpson outlined it, in that eventually title VII would be expanded; but I do think, in the interim, there certainly would be unfair treatment within the law itself, giving more coverage to people who are not citizens than those that are citizens.

Mr. **Sensenbrenner**. Ms. Alexander?

Ms. **Alexander**. The chamber has not looked into that question that you've just raised. But from an employer's point of view in terms of a practical matter, there are all kinds of problems that you can get into if you hire someone and they say they have a right to work in the United States, and you find later that they do not, then you are faced with terminating that individual and you may be faced with yet another cause of action for the termination, which may, then, be based perhaps on national origin.

And even if the claim is not meritorious, you still have to go through that administrative procedure. So, you can get into some catch-22 situations.

Mr. **Sensenbrenner**. The second problem that I see is the double jeopardy problem that I referred to in my questions to Mr. Pendleton and the gentleman from the EEOC. H.R. 3080 prohibits simultaneous filing, so you cannot file simultaneously under title VII as well as under the Frank amendment contained in H.R. 3080. However, it doesn't prohibit subsequent filings; so, you can go one route and get turned down, and then you can go another route. And that would require a lot of staff time, it would require a lot of attorneys' fees, and it probably would end up with the same result.

Have the legal departments of either of your organizations looked into that problem?

Ms. **Alexander**. I don't believe the chamber's legal department has looked into that. But I'd like to make this comment on that particular issue of double jeopardy, and that is that I feel the administrative agencies, enforcement agencies, are not pleased with that kind of situation either.

In the late 1960's, early 1970's, beginnings of title VII and the other civil rights jurisdictions, I remember a time when city ordinances, and State agencies, and the Federal EEOC were all in an employer's place of business at the same time, sometimes tripping over one another investigating the same case. That was not satisfactory to either the employer or, as a matter of fact, to the agencies who, in good conscience, want to allocate their resources to the widest number of people who feel that they have been discriminated against. Their overlapping jurisdictions really prevented that, and so the solution, from the agencies' point of view, was to have cross-filing and an agreement worked out that these kinds of cases would not be duplicated. And, in this instance, the EEOC, I think, has wide enough and sufficient enough coverage to handle it all by themselves.

Mr. **Sensenbrenner**. Since my time is limited, I would like to pose one further problem. The procedural provision of the Frank amendment give administrative law judges the power to assess attorneys' fees, and there is no review within the Department from the decision of an administrative law judge. I don't know of any other administrative law judge in the country that would have that kind of wide-ranging discretion without review. For example, I don't know of any other statute that allows administrative law judges to assess attorneys' fees upon administrative fiat.

Do you know of any other administrative law judge that would have those powers?

Ms. **Alexander**. No; I do not.

Mr. **Sensenbrenner**. Well, I would just make one final point. Looking at the procedural problems contained in the Frank amendment, it reminds me of what the lord said from the cross, and that's "Father, forgive them, for they know not what they do."

Mr. **Mazzoli**. The gentleman's time has expired.

The gentleman from California is recognized for 5 minutes; prior to which, if I could ask the gentleman's indulgence, and I'll yield back.

The gentleman from Wyoming.

Senator **Simpson**. Thank you. I have to go a little early to this. I just ask unanimous consent that my questions to Mr. Choate be entered in the record for response.

Mr. **Mazzoli**. Without objection.

[Questions and answers are included in the appendix.]

Mr. **Mazzoli**. The gentleman is recognized for 5 minutes.

Mr. **Berman**. Thank you, Mr. Chairman.

I don't know what I can say that would be more moving than the gentleman from Wisconsin's last comment, but I'd like to know from the chamber: At the present time the chamber does not seek to repeal or amend title VII; is that correct?

Ms. **Alexander**. No; it does not.

Mr. **Berman**. I'd be interested in your reaction to this problem we've mentioned earlier with respect to the coverage of seasonal industries, predominantly in agriculture but also in some offshoots of agriculture, which cause large numbers of large employers to be excluded from the basic provisions of title VII. Do you feel that is an inequity that should be addressed?

Ms. **Alexander**. If those inequities are generally addressed in the State forum, State civil rights commissions; and, they are actively pursued there.

Mr. **Berman**. You don't think there is a potential for discrimination that can occur? The chamber speaks very strongly of the reasons why it's nervous about employer sanctions. All of a sudden we're putting a liability on employers for hiring people who are not here legally. Now this new framework comes into being and would it not follow that at least conceptually employers without any racial motivation whatsoever, without any discriminatory intent, in terms of the prohibited classes, in their concern about avoiding that liability might err on the side of tending to prejudge certain classes of applicants? Is that so totally far-fetched?

Ms. **Alexander**. It's not, but in accepting the responsibility for keeping the paper work, and in accepting the fact that you require that documentation from all workers, all applicants for employment, I think it obviates that problem.

Mr. **Berman**. But I thought you indicated you prefer a version of this legislation which doesn't require employers to keep all paper work and documentation.

Ms. **Alexander**. We prefer a version which allows it to be optional, and——

Mr. **Berman**. Well, wait. Wait.

Ms. **Alexander** [continuing]. That's the freedom that the employer has, to keep it or not keep it.

Mr. **Berman**. Isn't it a little bit disingenuous to rely on the mandatory provisions of this legislation which you do not prefer, in order to deal with the problem you concede exists because of the employer's desire to avoid the liability from employer sanctions?

Ms. **Alexander**. I'm not relying on the mandatory provisions of H.R. 3080. I apologize, it must have been misconstrued there. I am relying on S. 1200, which gives employers the option to keep records or not to take the risk management for themselves, rather than your managing risk for them.

Mr. **Berman**. Well, there is someone else, someone between the employer and us, called the applicant for a job. You concede that the employer, without base or discriminatory motive, will have an interest in avoiding liability which could lead to the problem of prejudging a class of applicants in order to avoid any potential liability. You say the way to get around that, the way to obviate that problem, is the requirement that all employers have documentation and do the detailed paper work that will avoid this problem of potential discrimination, then you say but you don't support that version of the legislation which does that.

Ms. **Alexander**. Liability is still for an employer who makes those wrongful assumptions in an interest of being fearful of sanctions which may or may not occur, but let's say we accept that premise.

Mr. **Berman**. OK.

Ms. **Alexander**. There are still sanctions inherent in title VII for national origin discrimination, because that's what that becomes. If you make an assumption on the basis of how a person looks, or on what accent a person has, then that person has a right to file a discrimination complaint on the basis of color or national origin under title VII, or State or local agency.

Mr. **Berman**. Unless that person works for an employer who doesn't employ 15 or more people for 20 weeks a year; right?

Ms. **Alexander**. Or unless, in the State of California, for example, isn't it five, the number of persons covered under the State?

Mr. **Berman**. Well, we're talking about a federally mandated requirement of employer sanctions here.

Ms. **Alexander**. But if it's already available at the State level, why do you need it at the Federal level?

Mr. **Berman**. Because essentially the Federal Government is creating the incentive and the problem with the imposition of employer sanctions.

Mr. **Mazzoli**. The gentleman's time has expired.

The gentleman from New York is recognized for 5 minutes.

Mr. **Schumer**. Thank you, Mr. Chairman, and thank the witnesses.

The first comment I'd like to make is to the chamber. Even though we don't agree on this issue and some others, I think the chamber's attitude this year as opposed to last year is far more constructive and helpful to the committee and to passage of a bill, and probably towards getting some of the things that you want. One of the problems we've had with the immigration bill is so many people just say, "Let's try to kill the bill,". The result is we don't get an immigration bill, and second, they tend to lose input. So, even though we don't agree, I, for one, want to say I appreciate the more constructive stand that you've had this year.

I'd like to first address my question to the people at the chamber. There's a contradiction in what you've been saying, on the one hand, and in what Mr. Pendleton had said and all those who oppose things like the Frank Amendment, on the other hand. People are saying discriminations covered by another section of the law, and then they're saying that adding a new law would be a terrible thing to do.

If it's already covered, and it hasn't had a big effect why do you have such objections to expanding it? You know, you can wear the shoe on the other foot. To say it's not necessary also means that it should hardly be a major impediment to support legislation or a new provision.

Ms. **Alexander**. Simply paper work. I call it "administrivia." And that simply is more paper work, more forms, a different forum to get to know and understand different procedures. What happens is the time is taken up in procedures and arguments about whether there is jurisdiction or not, whether this is the right way to proceed or not. Under title VII and State statutes that are here and on the books, we know them, we know the procedures, we know the rules, and we get to the merits of the case and we get it concluded.

Mr. **Schumer**. Let me ask you a second question; and I'm not posing this as a compromise, because even EEOC has said they have a rough time administering what they have. But just theoretically, if alienage were brought under the provisions of title VII, would you then support that expansion?

Obviously I don't have to ask NAM, because you wouldn't, from what your testimony, but——

Ms. **Alexander**. No, we would not.

Mr. **Schumer**. Well, then, you're sort of undercutting what you said before.

Mr. **de Bernardo**. I would make the distinction that we have problems with the method of expansion of equal employment laws that have been attempted through H.R. 3080, but beyond the method, were done in a more appropriate fashion—more appropriate from our standpoint.

Mr. **Schumer**. Then, you're back to the old contradiction that you were before. If it's not paper work and if it's not method of an administration, and if you're saying it's already covered under national origin (a claim with which I disagree—there can be cases where it's strictly a status of citizenship that's causing the discrimination), then what do you object to? In other words, if it's already being handled by current law, and you're saying don't worry about it, do you think we should change the old law and make sure it's explicit so that alienage cases are not handled under a national origin guise?

Mr. **de Bernardo**. If the question is, how big of a problem do we have on our hands, something that Senator Simpson addressed earlier——

Mr. **Schumer**. Right.

Mr. **de Bernardo**. We would concur with the remarks of the previous panel, that we don't think there's a large problem as the law now is; however, we do feel that we would have a large problem, not just in terms of administrative requirements and the paper work. We are concerned that if H.R. 3080 would be enacted, that it would have such litigious effects in terms of a great deal of litigation.

And then, in fact, Mr. Sensenbrenner discussed, with the awarding of attorneys' fees, with the problem of affording one class, aliens——

Mr. Schumer. I understand that.

Mr. de Bernardo. More protection than other classes.

Mr. Schumer. Sir, I don't have much time, so I'm sorry to interrupt you; but, you are also saying, aside from those changes, you still wouldn't support a provision that said alienage should be a ground for bringing an action before the EEOC? You don't think it is a rational basis to bring a claim based alienage.

Mr. de Bernardo. We would support Mr. Choate's assertion that——a non-U.S. citizen should not be——

Mr. Schumer. OK. Then let me ask Mr. Choate about that.

Do you think it's fair to tell people who have to pay taxes, who are allowed to be drafted, who are on the road to becoming citizens—and in my experience, there are lots of different kinds of immigrants in my district, and they're dying to become citizens—do you think it's fair to tell those people they can be discriminated against?

Mr. Mazzoli. The gentleman's time has expired.

But you can answer the question, please.

Mr. Choate. I think it's fair to tell employers that they can give a preference to American citizens to hire people.

Mr. Schumer. You think, then, that they should not have to pay the same amount of taxes or could be deferred in the draft?

Mr. Choate. I think it's part of the cost of transition and part of the price one——

Mr. Mazzoli. The gentleman's time has expired.

The gentleman from Texas is recognized for 5 minutes.

Mr. Bryant. Well, does that mean you think we ought to tell the employer it's okay to discriminate but don't let the immigrant know that he can be discriminated against?

Mr. Choate. No. Not at all.

The point that I'm making comes very fundamentally to the point of getting the job in the first place. And I think that it puts a premium on the value of citizenship, and I think employers should be able to give a preference to Americans for American jobs.

Mr. Bryant. Yet, you think the aliens ought to go ahead and pay taxes and be drafted and bear all the other burdens of citizenship?

Mr. Choate. They secure most of the other benefits of citizenship of living in the country. Yes, sir.

Mr. Bryant. Well, of course, they live here——

Mr. Choate. I mean, certainly it happens with Americans, when we live in Japan, or Germany, or other countries, we——

Mr. Bryant. What's the point of wanting to be here if you can't get a job?

Mr. Choate. Well, I think many of them do get a job. That's not the question.

Mr. Bryant. But if they're discriminated against——

Mr. Choate. The question is, can Americans give a preference.

Mr. Bryant. If you go down to a factory and you can't get a job down there because you are being discriminated against, what's the point in being here?

Mr. Choate. Then they may wish to leave.

The point is that many of them can. The question is, can the employer have the right to choose an American first in the job.

Mr. **Bryant**. Let me ask you this question: What was the position of the National Association of Manufacturers the last time and this time with regard to amnesty? Have you supported the amnesty provisions of the bill?

Mr. **Choate**. NAM supported a variance of the amnesty bill. And they have supported sanctions, as well.

Mr. **Bryant**. But what is your position with regard to amnesty?

Mr. **Choate**. They're for amnesty.

Mr. **Bryant**. You're in favor of amnesty?

Mr. **Choate**. Yes.

Mr. **Bryant**. OK. And the chamber of commerce?

Ms. **Alexander**. Neutral.

Mr. **Bryant**. I'm sorry, I couldn't understand you.

Ms. **Alexander**. We have not taken a position.

Mr. **Bryant**. The chamber of commerce has no position with regard to amnesty.

Ms. **Alexander**. Right.

Mr. **Bryant**. What have you endorsed, just employer sanctions, this year; or what are you supporting this year with regarding immigration?

Mr. **de Bernardo**. We supported the elements in the Senate passed bills which addressed those areas, and which we have concerns about.

Mr. **Bryant**. Well, did you go to a member of the Senate and ask them to vote for the bill?

Mr. **de Bernardo**. What's that?

Mr. **Bryant**. Did you urge members of the Senate to vote for the bill or not?

You're a lobbying force here, as you should be. Did you ask the Senators to vote for the Simpson bill?

Mr. **de Bernardo**. I would say no. We supported those elements of the bill on which we agreed with their positions.

Mr. **Bryant**. But, of course, you can't do that, you've got to either vote "yes" or "no." And my question is: Did you urge your Senator friends to vote "yes"?

Mr. **de Bernardo**. We sent no letter to the Hill advocating passage.

Mr. **Bryant**. OK. Let me ask you about the example.

Well, let me ask this question first: Are you all objecting only to the citizenship provision, that is section 1(B) of the Frank amendment, or are you objecting, also, to the national origin provision of it?

Ms. **Alexander**. The whole thing.

Mr. **Bryant**. The whole provision?

Ms. **Alexander**. That's right.

Mr. **Bryant**. Do you think that it would be a good situation—or maybe you don't agree that it is legal under other laws. It seems to me that it is. But do you think that it is a healthy situation for an employer to be able to say, "I would like to hire aliens who are legally in the country, but I only want to hire those aliens from Sweden and Holland, I don't want to hire any aliens from Mexico or El Salvador"?

Ms. **Alexander**. That's national origin discrimination.

Mr. **Bryant**. Yes. But of course, that's not enforced at the present time except for employers of 15 or more, and apparently there's a question as to whether even that's enforceable.

Ms. **Alexander**. That has not been my experience. That's enforced in State and local ordinances as well, and they cover a broader work force than the Federal Government, most of them.

Mr. **Bryant**. Well, if the law read as you wanted it to, then it would allow discrimination, that is allow an employer not to hire a noncitizen but to hire instead a citizen. Would you like him, then, to be able to discriminate among groups of noncitizens?

That's my question.

Ms. **Alexander**. No. I mean, if the issue——

Mr. **Bryant**. Wouldn't that be possible?

Ms. **Alexander**. The issue simply, then, would be that the American business community certainly has more concern for the unemployed American citizen, but I don't see where the two are related.

Mr. **Bryant**. If there is no protection in the law for a noncitizen who is here legally, then would not that leave an employer in the position of being able to choose which groups of noncitizens he wanted to hire and exclude other groups of noncitizens?

Ms. **Alexander**. No. I don't see that. I see that puts it right over——

Mr. **Bryant**. Why not?

Ms. **Alexander** [continuing]. With the national origin issue then.

Mr. **Bryant**. Under what provision of the law?

Ms. **Alexander**. Under title VII, under State laws, under local laws; they have national origin provisions in them.

Mr. **Bryant**. But title VII only operates with regard to employers with 15 or more employees; right?

Ms. **Alexander**. That is correct.

Mr. **Bryant**. So, with less employees there would be no protection against that kind of discrimination between noncitizens of different national origins.

Ms. **Alexander**. Unless there's a State or local.

Mr. **Bryant**. But there is no State or local law like that in California or Texas, where the most immigration occurs.

Ms. **Alexander**. California certainly has more than its fair share.

Mr. **Mazzoli**. The gentleman's time has expired.

I appreciate the panel's attention. There may be other questions that will be sent to you by mail, and we would be requesting responses.

We will now adjourn, or, more precisely, recess.

I would ask the next panel, Congressman Garcia, Congressman Conyers, Mr. Reyes, Mr. Flemming and Mr. Keatinge, to try to be back at around 11 o'clock. We will hope to be starting at about 11 o'clock, it depends on when the Prime Minister finishes. I would, then, recess the panel until 11 o'clock.

[Recess.]

Mr. **Mazzoli**. The joint committee will come to order.

We now invite our next panel: Congressman Robert Garcia, representing the Hispanic caucus; Congressman John Conyers has informed us he is chairing another meeting and his statement will be made a part of the record; Mr. Benjamin Reyes, the deputy mayor of the city of Chicago; Mr. Arthur F. Flemming; and Mr. Richard S. Keatinge.

Welcome, gentlemen, and we appreciate your forbearance in the interruption. All your statements will be made a part of the record, and I would ask you, if you could, maybe to summarize your testimony so we could ask questions.

[The statement of Mr. Conyers follows:] [See appendix.]

Mr. MAZZOLI. And, Bob, you may proceed.

Mr. GARCIA. What I would like to do, with your permission, Mr. Chairman, in view of the fact that I'm going to spend most of my time talking about the Frank amendment, I would prefer to wait until Congressman Frank returns, and——

Mr. MAZZOLI. Well, let me, then, move to Mr. Reyes.

Senator SIMPSON. May I, Mr. Chairman——

Mr. MAZZOLI. Certainly.

Senator SIMPSON. I have a rollcall vote. We're still dabbling in the mystic arts over there, since 3:30 this morning. I will be back, and I apologize.

Mr. MAZZOLI. Thank you.

Yes, sir. You may proceed.

TESTIMONY OF THE HONORABLE ROBERT GARCIA, REPRESENTATIVE IN THE CONGRESS OF THE UNITED STATES FROM THE 18TH DISTRICT OF THE STATE OF NEW YORK: BENJAMIN REYES, DEPUTY MAYOR, CITY OF CHICAGO: ARTHUR F. FLEMMING, FORMER CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS, ACCOMPANIED BY SONIA JARVIS, MANAGING ATTORNEY, CENTER FOR NATIONAL POLICY REVIEW: AND RICHARD H. KEATINGE, CHAIRMAN, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY DAVID CARLINER, MEMBER AND COORDINATING COMMITTEE ON IMMIGRATION LAW.

Mr. REYES. Thank you. On behalf of Mayor Harold Washington, I will be presenting the statement that he had prepared; and, unfortunately, he can't be here with you today.

Chicago is a city with a long history of contributions from immigrants. Founded by a Haitian, Chicago has since welcomed new arrivals from all parts of the world. We continue today to welcome others to our great city. They are among the greatest of our resources.

Great steps have been taken to examine our current immigration dilemma and to develop potential solutions. Since 1981, several attempts have been made to modify and refine various provisions of the imigration reform bills. Some of these have been successful; others, such as the current provision of S. 1200 for employer sanctions and triggered legalizations, have not been adequately resolved.

The twin issues of sanctions and legalizations have been tied together since the initial attempts to draft immigration reform. It may be a political fact that one will not occur without the other. Before that is accepted or acted upon, however, the issue of the discriminatory potential for each of these provisions is necessary.

At the root of this legislation is the proposal for sanctioning employers who hire the undocumented. How employers know who is undocumented? How many Americans can prove their citizenship when asked? Only a U.S. passport can establish citizenship, and we know that few have passports, much less carry them day to day.

What, then, will the employers do? I suspect that as a shorthand for a fair identification process, employers would turn away those who appear "foreign," whether by name, race or accent. This is discrimination, and U.S. citizens and legal residents will be affected, along with the undocumented.

Even before any bill has been adopted, discriminatory effects are being felt in Chicago. The staff for the employment and training offices for the city of Chicago began to receive calls from employers assuming the law to be already in effect, requesting a halt to the referral of all Hispanics to them for employment. This sheds some light on the effects of the Simpson bill. If significant steps are not taken to address the potential discrimination caused by this legislation, we can expect wholesale discrimination to be all but institutionalized. The effects will be felt not only in the Hispanic community, but in the Asian and European communities as well.

Racism is a reality that affects us all. Passing legislation which further institutionalizes discrimination is a step we dare not to take. Denying any person the right to make a living, to make a contribution to our society based upon their national origin, would deny civil rights and the progress we have made.

The Chicago district office of the Immigration and Naturalization Service is currently conducting a program called "Operation Cooperation." This program involves the voluntary participation of employers and a verification of status for new hirees. Companies participating call the INS to verify the status of some persons applying for employment. This program does not attempt to verify the status of all applicants, but rather for those with questionable status. The results have been that agencies serving the Hispanic community in Chicago, such as the Travelers and Immigrants Aid, report a marked increase in complaints from those who are turned down. They were not turned away because they were undocumented, but rather because they had insufficient proof that they were entitled to seek employment. Many have become U.S. citizens by naturalization as well as birth.

Earlier this year, in an attempt to detain allegedly undocumented workers who were operating taxicabs in Chicago, agents from the INS began to stop and question persons entering a city office building. Contrary to the landmark decision which requires such steps to be based on "specific articulable facts." Far from being random in their efforts, agents were detaining all persons who appeared to be "foreign." Among those who were stopped and questioned were several Hispanic city employees who are U.S. citizens. Such inexcusable action led the mayor to issue Executive Order 85-1. This action was necessary "in order to assure that all residents of the city of Chicago, regardless of nationality or citizenship, shall have equal access to municipal benefits, opportunities and services." In Chicago, we are already experiencing the ripple effects of this pending legislation, that is, increased discrimination. Ironically, we are here to discuss whether or not this legislation will lead to that which is already occurring. While I and others struggle towards fairness for all, legislation is, today, being considered which would institutionalize a second class of residents in this country.

The potential for an amnesty program has been historically offered as a trade-off for employer sanctions. What we have is no longer a true amnesty program. We have increasingly restrictive requirements for legalization. The current plan has been called "triggered legalization," which will occur at some as yet unforeseen time when INS can effectively prevent unlawful border crossings, and employer sanctions have demonstrated their ability to prevent employment of undocumented workers.

Neither of these two conditions are likely to be met. Whether they are totally desirable is yet to be determined. But if sanctions don't work, there will be no legislation; if they do, there will be no one to legalize.

We support the concept of immigration reform. The need for reform has too long been ignored. But as I have also stated, such reform must be fair and must not fail to ensure the rights of all individuals. We are opposed to employer sanctions, because studies have shown that they won't be effective, will increase discrimination and will be unduly burdensome for employers and employees alike. If sanctions are, however, inevitable, steps to reduce the potential for discrimination, such as the Frank amendment and the Hart amendment, defeated on the Senate floor prior to the passage of S. 1200, must be taken to protect the rights of U.S. citizens and others who have a right to seek employment in this country. An adequate verification system must be in place prior to the use of employer sanctions, and it must be a system that does not infringe on the rights of any individuals.

1. Employer sanctions should be targeted. Universal documentation checks, the imposition of fines should be imposed only after an employer is found to be hiring undocumented workers. Requiring more would be overbroad and too expensive.

2. Protective measures need to be passed that protect persons who apply for employment in writing as well as in person. Many applicants will never get through the door because employers identify foreign-sounding names on applications.

3. The eligibility requirement for legalization should be as inclusive as possible. Included must be a realistic date of coverage, such as January 1, 1983, and the requirements for continuous residency must be relaxed to take into account the realistic situation of undocumented persons in the United States. Without true legalization, immigration reform is unbalanced and harsh.

4. The Sunset amendment to S. 1200, offered by Senator Kennedy, is a fine beginning at limiting the negative impact of employer sanctions. I urge you, however, to move even further towards true sunset language for employer sanctions. Even assuming the usefulness of sanctions, they are, at best, an experiment. A sunset provision acknowledges this and requires a thoughtful assessment after implementation.

5. Supply the resources necessary to adequately enforce existing labor laws. While the U.S. Senate was debating the discriminatory nature of the legislative initiative upon the floor September 13, 1985, Senator Simpson stated, "If you are going to do civil rights

legislation, let us do it. But let us not do it on an immigration reform bill." It is true that not all civil rights issues can or should be addressed in an immigration reform package, but we cannot ignore these issues either. One of the goals of the Civil Rights Act was to make it illegal to refuse employment based upon an applicant's race, religion or national origin. Senator Simpson further stated, in that same floor debate, "We are talking about the thing called discrimination based on alienage, which is puzzling to scholars and so, in a sense, vague that some of the great civil libertarians of both Houses in Congress have not even dealt with it for 20 years." I submit to you today, that as you consider legislation which would now make it illegal to hire someone and open wide the door of alienage discrimination, it is time to take up this "puzzling and vague matter" and justly resolve it, prior to passage of this bill. Thank you.

[The statement of Hon. Harold Washington follows:]

STATEMENT OF THE HONORABLE HAROLD WASHINGTON, MAYOR, CITY OF CHICAGO

Members of the Committee:

I am Harold Washington, Mayor of the City of Chicago. I served in the House of Representatives and am a former member of its Judiciary Committee. During my term as a Congressman from Illinois I worked extensively on immigration reform legislation. I appreciate your courtesy in requesting my appearance here today. It is an honor to be part of such a distinguished panel in helping to fashion needed immigration reforms. My experience as a Congressman and as the Mayor for this country's third largest city have led me to a deep understanding of the issues surrounding immigration and the need for serious and just reform of our current policies.

Chicago is a city with a long history of contributions from immigrants. Founded by a Haitian, Chicago has since welcomed new arrivals from all parts of the world. We continue today to welcome others to our great city, they are among the greatest of our resources.

Because we are a rich ethnic mosaic, it is natural for me to be here today to speak on the proposed immigration reform legislation. The concerns of our communities vary, and sometimes even contradict one another. But on the issue we are addressing today, that of the potential for discrimination in this legislation, I can say that we are united in our opposition.

As a former member of this House, and of the Judiciary Committee, I am not unaware of the complexity of this issue, nor the many potential pitfalls involved in drafting such legislation. But as you face the potential for passing such landmark provisions as contained in this bill, you must carefully consider the basic issues involved. The rights of individuals to work and freely associate with others have always been tantamount. To deny someone these rights is a grave mistake if based solely on their language, color or alienage.

Great steps have been taken to examine our current immigration dilemma and to develop potential solutions. Since 1981, several attempts have been made to modify and refine various provisions of immigration reform bills. Some of these have been successful; others, such as the current provision of S. 1200 for employer sanctions and triggered legalization; have not been adequately resolved.

The twin issues of sanctions and legalization have been tied together since the initial attempts to draft immigration reform. It may be a political fact that one will not occur without the other. Before that is accepted, or acted upon, however, the issue of the discriminatory potential of each of its provisions is necessary.

Employer Santions

At the root of this legislation is the proposal for sanctioning employers who hire the undocumented. How will employers know who is undocumented? How many Americans can prove their citizenship when asked. Only a U.S. passport alone can establish citizenship. And we know that few have passports, much less carry them day to day.

What then will employers do? I suspect that as a shorthand for a fair identification process, employers will turn away those who appear "foreign", whether by name, race, or accent. This is discrimination. And U.S. citizens and legal residents will be affected along with the undocumented.

Even before any bill has been adopted, discriminatory effects are being felt in Chicago. The staff for the Employment and Training office for the City began to receive calls from employers, assuming the law to be already in effect, requesting a halt to the referral of all Hispanics to them for employment. This should shed some light on the effects of the Simpson bill.

If significant steps are not taken to address the potential discrimination caused by this legislation, we can expect wholesale discrimination to be all but institutionalized. The effects will be felt not only in the Hispanic communities, but in the Asian as well. Racism is a reality that affects us all. Passing legislation which further institutionalizes discrimination is a step we dare not to take. Denying any person the right to earn a living, to make a contribution to our society based upon their national origin would deny civil rights and the progress we have made.

The Chicago District office of the Immigration and Naturalization Service is currently conducting a program called "Operation Cooperation". This program involves the voluntary participation of employers in a verification of status for new hirees. Companies participating call the INS to verify the status of some persons applying for employment. This program does not attempt to verify the status of all applicants but rather for those with "questionable status". The result has been that agencies serving the Hispanic communities in Chicago, such as Travelers and Immigrants Aid, report a marked increase in complaints from those who were turned away. They were not turned away because they were undocumented, but rather because they had insufficient proof that they were entitled to seek employment. Many have become U.S. citizens by naturalization, as well as by birth.

Earlier this year, in an attempt to detain allegedly undocumented workers who were operating taxi cabs in Chicago, agents from the INS began to stop and question persons entering a city office building, contrary to the landmark decision which requires such stops to be based on "specific, articulable facts". Far from being random in their efforts, agents were detaining all persons who appeared to be "foreign". Among those who were stopped and questioned were several Hispanic city employees who were U.S. citizens. Such inexcuseable actions led me to the issuance of Executive Order 85-1. This action was necessary "In order to assure that all residents of the City of Chicago, regardless of nationality or citizenship, shall have equal access to municipal benefits, opportunities and service". In Chicago, we are already experiencing the ripple effects of this pending legislation, (i.e. increased discrimination). Ironically, we are here to discuss whether or not this legislation will lead to that which is already occuring. While I and others struggle towards fairness for all, legislation is today being considered which would institutionalize a second class of resident in this country.

As I previously mentioned, measures which legitimize discrimination, such as the employer sanctions in this legislation, create additional and unnecessary obstacles for persons entitled to work in this country. While the unemployment rate continues to be unacceptable, and the poor struggle to survive, this debate focuses on efforts to erect even greater barriers for those seeking to better their lot, while stripping them of their ability to fight for their rights. Without the establishment of a secure national identification system, which poses a series of civil rights issues in and of itself, U.S. citizens will have significant difficulty in establishing their rights to seek employment. For the poor, this means that they face the quagmire of large bureaucracies and the high cost of such documents as a U.S. passport, in order to prove that they have the right to work.

The persons who drafted this proposed legislation were apparently cognizant of the potential for discrimination which would result from its passage. This is demonstrated in part by the plethora of studies and reports called for in its text.

While we hear flowery arguments about the issues from the proponents of employer sanctions; even the provisions strongest supported, Senator Simpson has seen the wisdom of supporting a sunset provision which could eliminate sanctions from the bill.

A bill must not be enacted that contains such doomed provisions as the current plans for employer sanctions, when its only legacy will be that of further institutionalizing discrimination. Sanctions will not prevent the hiring and continued exploitation of undocumented workers, as evidenced by the study conducted by GAO in 1981. Sanctions will lead to new ways on the part of employers to avoid detection by INS officials and others, and the benefits outweigh the risks. Should an employer be caught employing undocumented workers, the fines imposed on them will simply be taken from the workers themselves in the form of wages never to be paid.

Legalization

The potential for an "amnesty" program has been historically offered as a trade off for employer sanctions. What we have is no longer a true amnesty program, with increasingly restrictive requirements for legalization. The current plan has been called "triggered legalization" which will occur at some, as yet, unforeseen time when INS can effectively prevent unlawful border crossings, and employer sanctions have demonstrated their ability to prevent employment of undocumented workers. Neither of these two conditions are likely to be met, whether they are totally desireable is yet to be determined. But, if sanctions don't work, there will be no legislation; if they do, there will be no one to legalize.

As others before me have detailed, the legislation proposal of this legislative initiative is very different from previous programs. While they were seriously flawed, they at least approximated an effort to provide relief to persons who had spent significant portions of their lives contributing to our society, while living in constant fear of deportation and subject to exploitation. Just as the fictional image of "amnesty" has been shattered, so this bill betrays any hope for a just and adequate legalization program.

The enforcement provisions of this legislation have been finaly honed. While the legalization provisions have all but disappeared from view, this legislation represents great efforts to achieve control, none to achieve reform. The price tag for control is unacceptably high. The poor, the immigrants, the Asian and the Hispanic, the Black and the White will all pay the price. The price is high, it is the legitimized subjugation of those whom are "different". The perpetuation of a second class based on color, language, appearence and alienage. As a country which established itself as a country of immigrants; which has throughout history, grown from the contributions of those who dared to start anew; which has a motto "send us your tired, your poor, your huddled masses yearning to breathe free"; we are approaching a time in history when we will sever our life line; the immigration of those who want to improve their lot in life and to make a contribution to our society.

Conclusion

I support the concept of immigration reform. The need for reform has too long been ignored. But as I have also stated, such reform must be fair and must not fail to ensure the rights of all individuals.

I am opposed to employer sanctions because studies have shown that they won't be effective, will increase discrimination and will be unduly burdensome for employers and employees alike. If sanctions are, however, inevitable, steps to reduce the potential for discrimination such as the Frank amendment and the Hart/Levin amendment, defeated on the Senate floor prior to the passage of S. 1200; must be taken to protect the rights of U.S. citizens and others who have a right to seek employment in this country. An adequate verification system must be in place prior to the use of employer sanctions, and it must be a system that does not infringe on the rights of any individuals.

1. Employer sanctions should be targeted. Universal documentation checks and the imposition of fines should be imposed only after an employer is found to be hiring undocumented workers. Requiring more would be overbroad and too extensive.
2. Protective measures need to be passed that protect persons who apply for employment in writing as well as in person. Many applicants will never even get through the door because employers identify "foreign" sounding names on applications.
3. The eligibility requirements for legalization should be as inclusive as possible. Included must be a realistic date of coverage such as January 1, 1983, and the requirements for "continuous residency" must be relaxed to take into account the realistic situations of undocumented persons in the United States. Without true legalization, immigration reform is unbalanced and harsh.
4. The sunset amendment to S. 1200, offered by Senator Kennedy, is a fine beginning at limiting the negative impact of employer sanctions. I urge you, however, to move even further towards true sunset language for employer sanctions. Even assuming the usefulness of sanctions, they are, at best, an experiment. A sunset provision acknowledges this, and requires a thoughtful assessment after implementation.
5. Supply the resources needed to adequately enforce existing labor laws.

While the United States Senate was debating the discriminatory nature of this legislative initiative on the floor September 13, 1985, Senator Simpson stated: "If we are going to do civil rights legislation, let us do it, but let us not do it on an immigration reform bill..." It is true that all civil rights issues can or should be addressed in an immigration reform package, but we cannot ignore these issues either. One of the goals of the Civil Rights Act was to make it illegal to refuse employment based upon an applicant's race, religion or national origin. Senator Simpson further stated, in that same floor debate "We are talking about the thing called discrimination based on alienage, which is puzzling to scholars, and so, in a sense, vague that some of the great civil libertarians of both Houses of Congress have not even dealth with it for 20 years." I submit to you today, that as you consider legislation which would now make it illegal to hire someone, and open wide the door for alienage discrimination, it is time to take up this "puzzling" and "vague" matter and justly resolve it, prior to passage of this bill.

Mr. **Mazzoli**. Thank you very much, sir.

Do you want to go now, Bob?

Mr. **Garcia**. Yes.

Mr. **Mazzoli**. The gentleman from New York, Mr. Garcia, is recognized for 5 minutes.

Mr. **Garcia**. Thank you, Mr. Chairman.

I've been asked to testify on H.R. 3080, but before I start I want to make it very clear to all of you that I continue to be opposed to employer sanctions, because there is no doubt in my mind that they are discriminatory, and I also have doubts about its effectiveness. However, having said that, I hasten to add that since H.R. 3080 does have employer sanctions, its antidiscrimination provisions are absolutely necessary.

I want to commend the chairman of the full committee and you, Mr. Chairman, for living up to a commitment you made last year during the debate on H.R. 1510, that you would support the Frank amendment. And I say to you here, publicly, that both of you were true to your word and I'm deeply appreciative of that.

Discrimination still exists in the United States, and it is necessary to protect those most often affected by discrimination: The Hispanic community, the black community, and the asian community. Anyone of color is an easy mark for bigots. But there is really nothing we can do about that to eliminate bigotry; what I am concerned about with employer sanctions is that we may be making employers who are not otherwise prone to such prejudice anxious about hiring anyone who looks a little different or speaks with an accent.

The fear of discrimination is, by no means, a figment of my imagination; it is real. And while it is not my intention to offer a litany of cases involving discrimination, I would like to share with you a couple of examples that I think will help emphasize my point.

Last year, on June 19, 1984, an article that was written by Laurie Beckland in the Los Angeles Times, and which was published during the height of debate on H.R. 1510, discussed discrimination that was occurring in anticipation of the passage of the bill. I would like to read to you an excerpt from Ms. Beckland's article.

> Although it may be weeks before final congressional action on the Simpson-Mazzoli immigration bill, the proposed legislation is already prompting precautionary measures by some employers that, in some instances, have aroused complaints of discrimination against Latinos in the Southwest.

She goes on to say:

> Some Latino leaders charge that confusion over the proposed bill already has led to cases of increased animosity toward Latinos in those areas of the Southwest.

Admittedly, throughout the article Ms. Beckland talks about prejudice against undocumented persons, but she also refers to other Hispanics who are legally here; people like myself, who are being lumped together with undocumented persons simply because of the way we look or the way we may sound. In addition, all of the uproar was, as I said, in anticipation, of H.R. 1510. I have no doubt that the hysteria would be worse if such a bill were to become law.

I am also certain that most of the employers in Ms. Beckland's article were not trying to be vindictive or discriminatory. They were simply trying to protect themselves. They weren't attorneys; they don't understand the details of the law. Many probably weren't even aware that the bill hadn't yet been put to a vote. These people have businesses to run, and their first instinct is not to worry about whether or not they are being discriminatory; they worry, instead, about fines that affect their profits.

While I'm against sanctions for those reasons, it's not the bigots that truly concern me, because a bigot will always find a way to discriminate. No, it's the ordinary, the small business persons, who aren't going to want to take any chances, because, frankly, they can't afford to. But if sanctions are to be, then the antidiscrimination provisions in this bill must remain. Those provisions, at least, offer some protection for members of my community who would, inevitably be discriminated against if this bill becomes law.

I am going to cite one example of the kind of almost unconscious prejudice that many people exhibit. I believe it will underline my concern.

Mr. **Mazzoli**. Bob, if I could have, just for a second; I hate to interrupt you. We are operating on sort of a kind of a tight frame work here with the House session and the address from the Prime Minister of Singapore. Would it be possible, do you think you might be able to sum up in the next 2 or 3 minutes?

Mr. **Garcia**. Well, Mr. Chairman, I'll be frank with you, I've been asked to, on more than one occasion, testify on other sections of the legislation. I've chosen to——

Mr. **Mazzoli**. OK; go on.

Mr. **Garcia** [continuing]. Testify on this provision, because I believe it is the heart of the bill.

Mr. **Mazzoli**. I understand.

Mr. **Garcia**. And if you'll beg my forgiveness, I would ask you, I will try and be as quick as I possibly can.

Mr. **Mazzoli**. That's all I ask. Thank you very much.

You may proceed.

Mr. **Garcia**. This past March, the Texas House of Representatives Committee on Business and Commerce held hearings on legislation that would impose employer sanctions on employers who hired undocumented persons. During the hearing Mr. J. E. "Hank" Kastrop, a Texas businessman, testified before the committee in favor of sanctions. At one point Mr. Kastrop was questioned by a State representative Hugo Berlanga, who is from Corpus Christi, on whether or not he hired undocumented persons. The representative asked Mr. Kastrop how he determined whether an individual was undocumented, and I would like to read an excerpt from that testimony.

This is the representative: "How did you make that determination, that is whether the individual was undocumented?"

Mr. Kastrop said: "We had very few of them apply. We have had blacks, we have had everything else you can think of, but we have not had any of the illegal aliens that I know of."

"How do you know that?" asked the representative.

"We check the records, we check them out, gentlemen. If you have a fellow up to your office and he can't speak English, and he is looking for a job, and he doesn't have a credit card, and he lives with six other guys that are illegal aliens, you don't have to look twice to determine this guy shouldn't be in this country. And it gets me when they invade what we've built here and take advantage of what we've got. And I think that, if the State can do something about it, they really ought to."

My father spoke English with an accent, and he never had a credit card; and sometimes, personally, between us, I wish I never had any credit cards either. But yet, he was born a U.S. citizen.

The real problem here is that Mr. Kastrop may not be a mean spirited person, but neither is he atypical. I believe that he is representative. There is a mounting fear in this country that we are being invaded by hordes of foreigners, that is, those who are perceived to be foreign because of the way they look or speak. This fear is not based on reality or a clear assessment of the situation; it is, instead, a prejudice resulting largely from economic frustration. Our economic problems cannot be blamed on immigrants, undocumented or otherwise, that's scapegoating.

An editorial in the New York Times last year called Simpson-Mazzoli "this generation's immigration bill." And that may be so, but we Hispanics are this generation's immigrants, and despite the fact that many of us are U.S. citizens, we can't simply assume that we will not be discriminated against. We can't merely hope that employers will take the time to distinguish between me and someone else who may not be legally entitled to work; we, therefore, need the protection this bill offers.

There is another very important reason that these protections are necessary. In order for the legalization program contained in this bill to work at all, those persons who are newly legalized must also be protected, they, too, must be given the opportunity to find employment and to become contributing members of society. Those individuals who take advantage of the legalization program and are given temporary residence status will need the special protections provided by this bill. Many will come forward in good faith, believing that they have been offered an opportunity to work and become productive members of society. If we do not protect them, particularly in this interim status, the legalization program will not work.

I'm certain that those who drafted this legislation want the legalization program to be effective as possible. That will only be possible if adequate protection is afforded to this newly legalized class of persons.

All of these reasons are the basis for my support for the antidiscrimination provisions in this bill, but—and I seem to always have a "but"—I wish that this bill would have used the amendment that the gentleman from Massachusetts, Mr. Frank, introduced during House debate on H.R. 1510. And, incidentally, that amendment passed by an overwhelming majority of 404 to 9. While I understand that the language contained in H.R. 3080 was written in much the same spirit as Mr. Frank's amendment, it nonetheless does not offer protection to long-term legal permanent residents who do not apply or intend to apply to become citizens. Neither does it cover persons who are otherwise authorized to work, by law, but who may not fit, for one reason or another, into the class of intending citizens as described in H.R. 3080.

I'm not an attorney, gentlemen, and I'm here to debate the question of alienage discrimination and whether or not it should be covered in the framework of this legislation. My point is much simpler. Anyone who is here legally—and I repeat, anyone who is here legally—should be afforded the opportunity to work without fear of discrimination, whether or not that person is a citizen or permanent legal resident. If any individual pays taxes, obeys the law, and, if called upon, to serve in the U.S. Armed Forces, then in my mind that individual should have every right to a job and ought to be protected against possible or even probable discrimination.

I realize that not everyone sees this issue quite as simply as I do, but then maybe that's the problem. In any case, it is my hope that the subcommittee will adopt the Frank amendment in its original form as part of this bill.

And I'd like to just finish by making one last point. The antidiscrimination provisions in this bill must be more than paper protection. These provisions must be actively and aggressively enforced. We need a special counsel that will look out for the thousands of individuals who will be discriminated against because of employer sanctions. We need to make certain that the protections provided by this bill will not become political pawns in a Justice versus Congress tug of war on civil rights. The distinguished chairman of this committee has stood, as far as I'm concerned, as a symbol of civil rights since he first came to Congress in 1948, and while I do not agree with him on employer sanctions, I am, nonetheless, certain that we both want to make sure that any discrimination that does occur as a result of sanctions will be minimized by the antidiscrimination provisions in this bill. I, therefore, ask that you send a message to the White House that this language is not for show, it is there, as I said, to be actively and aggressively enforced.

I would like simply to emphasize what I have said throughout my testimony: If we're going to have employer sanctions, and if it has to be a part of the bill, then we must have adequate protection against discrimination. And I believe that the antidiscrimination provisions in H.R. 3080 come a long way toward addressing this problem, and, at the very least, that the Frank provisions should be maintained.

I thank you and I beg your forgiveness for taking as long as I have.

Mr. **Mazzoli.** I thank my friend for his testimony. That's very helpful to us.

[The statement of Mr. Garcia follows:]

TESTIMONY BEFORE THE IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW SUBCOMMITTEE ON ANTI-DISCRIMINATION PROVISIONS IN HR 3080

CONGRESSMAN ROBERT GARCIA

Mr. Chairman, I want to thank you for the opportunity to testify before your subcommittee. I also want to commend you for holding these hearings on this most important legislation. It is my hope that during this Congress we will be able to come up with legislation that is both realistic and acceptable to all of us.

I have been asked to testify on the anti-discrimination provisions of HR 3080. I feel it is necessary, however, to state outright that I am against employer sanctions as a way to discourage undocumented immigration because sanctions would prove to be discriminatory, and I have doubts about their effectiveness.

That said, I hasten to add that since HR 3080 does have employer sanctions, its anti-discrimination provisions are absolutely necessary, and I commend the distinguished Chairmen of the full committee and this subcommittee for living up to a commitment they made last year on the floor of the House during debate on HR 1510, the Simpson-Mazzoli Immigration Reform and Control Act. During the course of that debate both gentlemen stated that they would support the amendment offered by the gentleman from Massachusetts, Mr. Frank, which contained anti-discrimination provisions similar to those in HR 3080, in a House-Senate conference on HR 1510. They were true to their word.

Discrimination still exists in the United States, and that makes it necessary to protect those most often affected by discrimination: the Hispanic, black, and Asian people of this nation. Anyone of color is an easy mark for bigots, but there is really

NOTHING WE CAN DO, HERE, TO ELIMINATE BIGOTRY. WHAT I AM CONCERNED ABOUT WITH EMPLOYER SANCTIONS IS THAT WE MAY BE MAKING EMPLOYERS WHO ARE NOT OTHERWISE PRONE TO SUCH PREJUDICE ANXIOUS ABOUT HIRING SOMEONE WHO "LOOKS A LITTLE DIFFERENT" OR SPEAKS WITH AN "ACCENT."

THIS FEAR OF DISCRIMINATION IS NOT A FIGMENT OF MY IMAGINATION. IT IS VERY REAL, AND WHILE IT IS NOT MY INTENTION TO OFFER A LITANY OF CASES CONCERNING THIS DISCRIMINATION, I WOULD LIKE TO SHARE WITH YOU A COUPLE OF EXAMPLES THAT I THINK WILL HELP TO EMPHASIZE MY POINT.

A JUNE 19, 1984 ARTICLE BY LAURIE BECKLAND IN THE LOS ANGELES TIMES, PUBLISHED DURING THE HEIGHT OF DEBATE ON HR 1510, DISCUSSED DISCRIMINATION THAT WAS OCCURRING IN ANTICIPATION OF THE PASSAGE OF THE BILL. I'D LIKE TO READ TO YOU AN EXCERPT FROM MS. BECKLAND'S ARTICLE, "ALTHOUGH IT MAY BE WEEKS BEFORE FINAL CONGRESSIONAL ACTION ON THE SIMPSON-MAZZOLI IMMIGRATION BILL, THE PROPOSED LEGISLATION IS ALREADY PROMPTING PRECAUTIONARY MEASURES BY SOME EMPLOYERS THAT, IN SOME INSTANCES HAVE AROUSED COMPLAINTS OF DISCRIMINATION AGAINST LATINOS IN THE SOUTHWEST." SHE GOES ON TO SAY, "SOME LATINO LEADERS CHARGE THAT CONFUSION OVER THE PROPOSED BILL ALREADY HAS LED TO CASES OF INCREASED ANIMOSITY TOWARD LATINOS IN SOME AREAS OF THE SOUTHWEST."

ADMITTEDLY, THROUGHOUT THE ARTICLE, MS. BECKLAND TALKS ABOUT PREJUDICE AGAINST UNDOCUMENTED PERSONS, BUT SHE ALSO REFERS TO OTHER HISPANICS, LEGALLY HERE; PEOPLE LIKE ME, WHO ARE BEING LUMPED TOGETHER WITH UNDOCUMENTED PERSONS SIMPLY BECAUSE OF THE WAY THEY LOOK OR TALK. IN ADDITION, ALL OF THE UPROAR WAS, AS I SAID, IN ANTICIPATION OF THE PASSAGE OF HR 1510. I HAVE NO DOUBT THAT THE HYSTERIA WOULD BE WORSE IF SUCH A BILL WERE TO PASS.

I'M ALSO CERTAIN THAT MOST OF THE EMPLOYERS IN MS. BECKLUND'S ARTICLE WERE NOT TRYING TO BE VINDICTIVE OR DISCRIMINATORY. THEY WERE SIMPLY TRYING TO PROTECT THEMSELVES. THEY AREN'T ATTORNEYS; THEY DON'T UNDERSTAND THE DETAILS OF THE LAW. MANY PROBABLY WEREN'T EVEN AWARE THAT THE BILL HADN'T YET BEEN PUT TO A VOTE. THESE PEOPLE HAVE BUSINESSES TO RUN, AND THEIR FIRST INSTINCT IS NOT TO WORRY ABOUT WHETHER OR NOT THEY ARE BEING DISCRIMINATORY. THEY WORRY, INSTEAD, ABOUT FINES THAT AFFECT THEIR PROFITS.

THAT'S WHY I AM AGAINST SANCTIONS. IT'S NOT THE BIGOTS THAT TRULY CONCERN ME; THEY WILL ALWAYS FIND A WAY TO DISCRIMINATE. NO, IT'S THE ORDINARY SMALL BUSINESSPERSONS WHO AREN'T GOING TO WANT TO TAKE ANY CHANCES. THEY CAN'T AFFORD TO. BUT, IF SANCTIONS ARE TO BE, THEN THE ANTI-DISCRIMINATION PROVISIONS IN THIS BILL MUST REMAIN. THOSE PROVISIONS AT LEAST OFFER SOME PROTECTION FOR MEMBERS OF MY COMMUNITY WHO WOULD, INEVITABLY, BE DISCRIMINATED AGAINST IF THIS BILL BECOMES LAW.

I AM GOING TO CITE ONE MORE EXAMPLE OF THE KIND OF ALMOST UNCONSCIOUS PREJUDICE THAT MANY PEOPLE EXHIBIT. I BELIEVE IT WILL SERVE TO UNDERLINE MY CONCERN. THIS PAST MARCH, THE TEXAS HOUSE OF REPRESENTATIVES COMMITTEE ON BUSINESS AND COMMERCE HELD HEARINGS ON LEGISLATION THAT WOULD IMPOSE EMPLOYER SANCTIONS ON EMPLOYERS WHO HIRE UNDOCUMENTED PERSONS.

DURING THE HEARINGS, MR. J.E. "HANK" KASTROP, A TEXAS BUSINESSMAN, TESTIFIED BEFORE THE COMMITTEE IN FAVOR OF SANCTIONS. AT ONE POINT MR. KASTROP WAS QUESTIONED BY STATE REP. HUGO BERLANGA (D-CORPUS CHRISTI) ON WHETHER OR NOT HE HIRED UNDOCUMENTED PERSONS. REP. BERLANGA ASKED MR. KASTROP HOW HE DETERMINED WHETHER OR NOT AN INDIVIDUAL WAS UNDOCUMENTED. I'D LIKE TO READ YOU AN EXCERPT FROM THE HEARING TRANSCRIPT CONTAINING MR. KASTROP'S REPLY:

Rep. Berlanga: How did you make that determination? (that an individual was undocumented)

Mr. Kastrop: We have had very few of them apply. We have had blacks. We have had everything else you can think of. But, we have not had any of the illegal aliens apply that I know of.

Rep. Berlanga: How do you know that?

Mr. Kastrop: We check the records. We check them out. Gentlemen, if you have a fellow come up to your office, and he can't speak English, and he is looking for a job, and he doesn't have many credit cards, and he lives with six other guys that are illegal aliens, you don't have to look twice to determine this guy shouldn't be in this country. And it gets me when they invade what we've built here and take advantage of what we've got, and I think that, if the State, can do something about it, they really ought to do it..."

You know my father spoke English with an accent, and he didn't have many credit cards. Yet, he was born a U.S. citizen. The real problem here is that Mr. Kastrop may not be a mean spirited person but neither is he atypical. I believe he is representative. There is a mounting fear that in this country that we are being invaded by hordes of "foreigners" -- that is, those who are perceived to be foreign because of the way they look or speak. This fear is not based on reality or a clear assessment of the situation. It is, instead, a prejudice resulting largely from economic frustration. Our economic problems cannot be blamed on immigrants -- undocumented or otherwise. That's scapegoating.

An editorial in the New York Times last year called Simpson-Mazzoli "this generation's immigration bill." That may be so, but we -- Hispanics -- are this generation's immigrants, and despite the fact that many of us are citizens, we can't simply assume that we will not be discriminated against. We can't merely hope that employers will take time to distinguish between me

AND SOMEONE WHO MAY NOT BE LEGALLY ENTITLED TO WORK. WE, THEREFORE, NEED THE PROTECTION THAT THIS BILL OFFERS.

THERE IS ANOTHER VERY IMPORTANT REASON THAT THESE PROTECTIONS ARE NECESSARY. IN ORDER FOR THE LEGALIZATION PROGRAM CONTAINED IN THIS BILL TO WORK AT ALL, THOSE PERSONS WHO ARE NEWLY LEGALIZED MUST ALSO BE PROTECTED. THEY TOO MUST BE GIVEN THE OPPORTUNITY TO FIND EMPLOYMENT AND TO BECOME CONTRIBUTING MEMBERS OF SOCIETY. THOSE INDIVIDUALS WHO TAKE ADVANTAGE OF THE LEGALIZATION PROGRAM, AND ARE GIVEN "TEMPORARY RESIDENCE STATUS" WILL NEED THE SPECIAL PROTECTIONS PROVIDED BY THIS BILL. MANY WILL COME FORWARD IN GOOD FAITH, BELIEVING THAT THEY HAVE BEEN OFFERED AN OPPORTUNITY TO WORK AND BECOME PRODUCTIVE MEMBERS OF SOCIETY. IF WE DO NOT PROTECT THEM, PARTICULARLY IN THIS INTERIM STATUS, THE LEGALIZATION PROGRAM WILL NOT WORK. I'M CERTAIN THAT THOSE WHO DRAFTED THIS LEGISLATION WANT THE LEGALIZATION PROGRAM TO BE AS EFFECTIVE AS POSSIBLE. THAT WILL ONLY BE POSSIBLE IF ADEQUATE PROTECTION IS OFFERED TO THIS NEWLY LEGALIZED CLASS OF PERSONS.

ALL OF THESE REASONS ARE THE BASIS FOR MY SUPPORT FOR THE ANTI-DISCRIMINATION PROVISIONS IN THIS BILL, BUT, AND I SEEM TO ALWAYS HAVE A BUT, I WISH THAT THIS BILL WOULD HAVE USED THE AMENDMENT THAT THE GENTLEMAN FROM MASSACHUSETTS, MR. FRANK, INTRODUCED DURING HOUSE DEBATE ON HR 1510; INCIDENTALLY, THAT AMENDMENT PASSED BY AN OVERWHELMING MARGIN OF 404-9.

WHILE I UNDERSTAND THAT THE LANGUAGE CONTAINED IN HR 3080 WAS WRITTEN IN MUCH THE SAME SPIRIT AS MR. FRANK'S AMENDMENT, IT, NONETHELESS, DOES NOT OFFER PROTECTION TO LONG TERM LEGAL PERMANENT RESIDENTS WHO DO NOT APPLY OR INTEND TO APPLY TO BECOME CITIZENS. NEITHER DOES IT COVER PERSONS WHO ARE OTHERWISE AUTHORIZED TO WORK BY LAW BUT WHO MAY NOT FIT, FOR ONE REASON OR ANOTHER, INTO THE CLASS ON "INTENDING CITIZENS" AS DESCRIBED IN HR 3080.

I AM NOT AN ATTORNEY, AND I AM NOT HERE TO DEBATE THE QUESTION OF ALIENAGE DISCRIMINATION AND WHETHER OR NOT IT SHOULD BE COVERED IN THE FRAMEWORK OF THIS LEGISLATION. MY POINT IS MUCH SIMPLER: ANYONE WHO IS HERE LEGALLY SHOULD BE AFFORDED THE OPPORTUNITY TO WORK WITHOUT FEAR OF DISCRIMINATION, WHETHER OR NOT THAT PERSON IS A CITIZEN OR PERMANENT LEGAL RESIDENT. IF AN INDIVIDUAL PAYS TAXES, OBEYS THE LAW, AND IF CALLED UPON, SERVES IN THE U.S. ARMED FORCES, THEN IN MY MIND, THAT INDIVIDUAL SHOULD HAVE EVERY RIGHT TO A JOB, AND OUGHT TO BE PROTECTED AGAINST POSSIBLE OR EVEN PROBABLE DISCRIMINATION.

I REALIZE THAT NOT EVERYONE SEES THIS ISSUE QUITE AS SIMPLY AS I DO, BUT THEN MAYBE THAT'S THE PROBLEM. IN ANY CASE, IT IS MY HOPE THAT THE SUBCOMMITTEE WILL ADOPT THE FRANK AMENDMENT IN ITS "ORIGINAL" FORM AS PART OF THIS BILL.

ONE LAST POINT, THE ANTI-DISCRIMINATION PROVISIONS IN THIS BILL MUST BE MORE THAN PAPER PROTECTIONS. THESE PROVISIONS MUST BE ACTIVELY AND AGGGRESSIVELY ENFORCED. WE NEED A SPECIAL COUNSEL THAT WILL LOOK OUT FOR THE THOUSANDS OF INDIVIDUALS WHO WILL BE DISCRIMINATED AGAINST BECAUSE OF EMPLOYER SANCTIONS. WE NEED TO MAKE CERTAIN THAT THE PROTECTIONS PROVIDED BY THIS BILL WILL NOT BECOME POLITICAL PAWNS IN A JUSTICE VS. CONGRESS TUG-OF-WAR ON CIVIL RIGHTS.

THE MOST DISTINGUISHED CHAIRMAN OF THIS COMMITTEE HAS STOOD AS A SYMBOL OF CIVIL RIGHTS SINCE HE FIRST CAME TO CONGRESS IN 1948. WHILE I DO NOT AGREE WITH HIM ON EMPLOYER SANCTIONS, I AM, NONETHELESS, CERTAIN THAT WE BOTH WANT TO MAKE SURE THAT ANY DISCRIMINATION THAT DOES OCCUR AS A RESULT OF SANCTIONS WILL BE MINIMIZED BY THE ANTI-DISCRIMINATION PROVISIONS IN THIS BILL. I, THEREFORE, ASK THAT YOU SEND A MESSAGE TO THE WHITE HOUSE THAT THIS LANGUAGE IS NOT FOR SHOW. IT IS THERE, AS I SAID, TO BE ACTIVELY AND AGGRESSIVELY ENFORCED.

IN CONCLUSION, I WOULD SIMPLY LIKE TO EMPHASIZE WHAT I HAVE SAID THROUGHOUT MY TESTIMONY: IF EMPLOYER SANCTIONS MUST BE A PART OF THIS BILL, THEN THERE MUST BE ADEQUATE PROTECTION AGAINST DISCRIMINATION. THE ANTI-DISCRIMINATION PROVISIONS IN HR 3080 COME A LONG WAY TOWARD ADDRESSING THIS PROBLEM, AND AT THE VERY LEAST, THOSE PROVISIONS SHOULD BE MAINTAINED.

THANK YOU.

Mr. MAZZOLI. Mr. Flemming.

Mr. FLEMMING. Mr. Chairman and members of the committee, my name is Arthur Flemming. I am pleased to testify before you today on this important issue of employer sanctions and employment discrimination against U.S. citizens, lawful permanent resident aliens, refugees, and other persons authorized to reside and work in the United States. Accompanying me is Sonia Jarvis, managing attorney for the Center for National Policy Review.

The testimony I present today sets forth my personal view. These views are consistent, however, with testimony I presented before the House subcommittee in October 1981, on behalf of the United States Commission on Civil Rights——

Mr. MAZZOLI. Mr. Flemming, will you excuse me for a second?

Mr. FLEMMING [continuing]. The Commission which I formerly chaired——

Mr. MAZZOLI. Excuse me just one second. Again, I don't want to be impertinent here, but I notice that, if you're going to read word for word, your statement——

Mr. FLEMMING. I'm not, Mr. Chairman.

Mr. MAZZOLI. Are you? OK. Because we have——

Mr. FLEMMING. I've listened to your——

Mr. MAZZOLI. Thank you.

Mr. FLEMMING [continuing]. request, and I'm going to do my best to comply with it.

Mr. MAZZOLI. Thank you very much.

Mr. FLEMMING. The testimony that I presented before is attached. Today, as in the past, I certainly recognize the seriousness of the overall problem of undocumented immigration, which Congress seeks to address. I continue to support the stand taken by the Civil Rights Commission when I chaired it, which strongly recommended, as set forth in our report, a three-pronged approach to reduce the participation of undocumented workers in the domestic labor market; namely:

Vigorous enforcement of the Fair Labor Standards Act and other labor laws, strengthening the capacity of the Immigration and Naturalization Service to enforce current immigration law, and vigorous efforts to foster bilateral or multilateral agreements with the major sending countries in order to reduce and regulate cross-border population flow.

Second. Like Congressman Garcia, I continue to oppose employer sanction proposals either with or without a compulsory system of verification of authorization to work. Some of the reasons we set forth in our Commission report for opposing employer sanctions are contained in my statement which I request be included in full as a part of my testimony.

Third, if Congress should, however, adopt some form of employer sanction, it is my judgment that it is essential to include provisions which provide all persons authorized to work in the United States with strong and enforceable protection against employment discrimination based upon national origin or noncitizen status. To this end I strongly endorse the Frank amendment which passed the House in 1984 by a vote of 404 to 9, and urge that those provisions be included in any immigration bill which includes employer sanctions.

Fourth. Given my deep concerns about the efficacy, discriminatory impact and threat to civil liberties which arise from employer sanctions, I endorse the concept of imposing a sunset provision on sanctions which would require Congress to reconsider the program in light of practical experience. Although I believe that the limited "sunset" which the Senate approved as an amendment to S. 1200 is a step in the right direction, I strongly recommend that an automatic termination be adopted which would eliminate employer sanctions from the laws of the United States at the end of, say, a 3-year period, unless Congress clearly and affirmatively reinacts them.

The balance of my comments will focus on the ethical and constitutional basis for prohibiting employment discrimination based on noncitizen status and the need for strong protection against this danger for all persons authorized to work in the United States. Lawfully resident aliens have a constitutional right to work. That has been spelled out by certain decisions of the Supreme Court. These decisions establish as the law of the land the principle that all persons lawfully residing and authorized to work in the United States enjoy a fundamental right to work which cannot be abridged except for compelling reasons.

The proposed employer sanctions included in S. 1200 and H.R. 3080 pose a serious threat to this principle. Whereas other Federal laws have made it unlawful for an employer to deny employment to persons because of certain personal characteristics, sanctions represent a unique effort to make it unlawful to give employment to persons because of certain characteristics, namely their lack of legal status in the United States. As such employer sanctions contemplate radical changes in employment practices. I am convinced that employer sanctions will increase employment discrimination on several levels and that noncitizens authorized to be and work in the United States are especially vulnerable.

Consistent with the conclusions of the Commission as set forth in the "Tarnished Golden Door," there are several reasons why I believe that employer sanctions will increase the potential for discrimination on the basis of national origin, race, and noncitizen status.

Mr. MAZZOLI. Mr. Flemming, if you'll excuse me again, I really—I know it sounds like bad manners, but I wonder if—you know, the time has more or less expired—if you think you might have another couple of minutes you could summarize for us?

Mr. FLEMMING. OK. I'll do that.

Mr. MAZZOLI. Thank you. We have lots of members who have lots of questions.

Mr. FLEMMING. OK, fine. I appreciate that.

First, I believe the danger of employment discrimination is inherent in the basic character of employer sanctions which impose upon the employer the obligation to ascertain the right to work of all persons. Second, employer sanctions will encourage those who are inclined to discriminate to perceive sanctions as a pretext or excuse for denying employment on invidious grounds. And, third, the optional verification requirement will not adequately address this potential for discrimination.

In my judgment existing employment laws do not provide protection for new forms of discrimination arising for employer sanctions. In the Supreme Court decision it was made clear that title VII does not cover the situation as I believe it should be covered I recognize that some courts and commentators have argued that section 1981 of the Civil Rights Act of 1866 prohibits both public and private employers from discriminating against noncitizens solely on the basis of their noncitizen status. It is my understanding, however, that the Federal circuit courts have split on this particular issue; therefore, it seems to me that there is a very clear need for the kind of protection such as the House of Representatives approved in 1984. And I, for reasons set forth in my testimony, I prefer the Frank amendment in its original form as contrasted with the provisions of the present bill.

I appreciate this opportunity to appear before you.

Mr. MAZZOLI. Thank you very much. I appreciate it, and again, I'm very sorry.

Mr. FLEMMING. That's all right.

Mr. MAZZOLI. I appreciate fully, and I thank you so much.

Mr. FLEMMING. That's all right. I understand your problem, Mr. Chairman.

[The statement of Mr. Flemming follows:]

TESTIMONY OF DR. ARTHUR S. FLEMMING
BEFORE THE
HOUSE SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND INTERNATIONAL LAW
AND THE
SENATE SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY

OCTOBER 9, 1985

Mr. Chairman, members of the Subcommittees, I am Arthur S. Flemming. I am pleased to testify before you today on the important issue of employer sanctions and employment discrimination against U.S. citizens, lawful permanent resident aliens, refugees and other persons authorized to reside and work in the United States. Accompanying me is Sonia Jarvis, Managing Attorney with the Center for National Policy Review.

The testimony I present today sets forth my personal views. These views are consistent with testimony I presented before the House Subcommittee in October, 1981 on behalf of the United States Commission on Civil Rights (the Commission), which I formerly chaired. That testimony is attached. As indicated in the attached letter to Representative Robert Garcia from Clarence M. Pendleton, Jr., in 1983 the Commission carefully reconsidered the implications of proposed employer sanctions, and reaffirmed the positions and recommendations contained in the Commission's report The Tarnished Golden Door. As you may know, this report was prepared during my tenure as chairman and submitted to Congress and the President in September of 1980.

I. Summary of Testimony

Today, as in the past, I recognize the seriousness of the overall problem of undocumented immigration which Congress seeks to address. I continue to stand by the Commission's strong recommendation, as set forth in The Tarnished Golden Door, of a three-pronged approach to reduce the participation of undocumented workers in the domestic labor market, namely; 1) vigorous enforcement of the Fair Labor Standards Act and other labor laws; 2) strengthening the capacity of the Immigration and Naturalization Service (INS) to enforce current immigration law; and 3) vigorous efforts to foster bi-lateral or multi-lateral agreements with the major sending countries in order to reduce and regulate cross-border population flows.

Second, I continue to oppose employer sanctions proposals either with or without a compulsory system of verification of authorization to work. This position is consistent with that of a majority of the Commission which I chaired and which recommended against employer sanctions on the grounds that: 1) employer sanctions impose law enforcement duties on private persons and corporations with undesirable consequences for both the employer and job applicant; 2) employer sanctions would increase employment discrimination against United States citizens and lawful resident aliens who are racially or linguistically identifiable with major immigrant groups; and 3) proposals for the adoption of a compulsory work permit or other universal worker identifiers undermine civil liberties. As the majority of the Commission concluded in 1980, "the Commission does not believe that, serious as the adverse impact of the undocumented workers may be on the employment opportunities of some citizens and legal aliens, the nation is warranted in traveling a path which could result in depriving all citizens of civil liberties. The Commission does not believe that the ends that would be achieved justify the proposed means." [Tarnished Golden Door, page 73.]

Third, if Congress should, however, adopt some form of employer sanctions, it is my judgment that it is essential to include provisions which provide all persons authorized to work in the United States strong and enforceable protection against employment discrimination based upon national origin or non-citizen status. To this end I strongly endorse the "Frank Amendment" which passed the House in 1984 by a vote of 404-9, and urge that those provisions be included in any immigration bill which includes employer sanctions. In this regard I am disappointed. S.1200 does not include such protections, and HR.3080 includes anti-discrimination provisions substantially weaker and less enforceable than the provisions of the House-passed "Frank Amendment". Employer sanctions will encourage discriminatory practices, which is why I oppose them. If they become law they must be countered by strong anti-discrimination provisions in the same law. That is why I favor a "Frank Amendment" that has not been weakened.

Fourth, given my deep concerns about the efficacy, discriminatory impact and threat to civil liberties which arise from employer sanctions, I endorse the concept of imposing a "sunset" provision on sanctions which would require Congress to reconsider the program in light of practical experience. Although I believe that the limited "sunset" which the Senate approved as an amendment to S.1200 is a step in the right direction, I strongly recommend that an automatic termination be adopted which would eliminate employer sanctions from the laws of the United States at the end of three years unless Congress clearly and affirmatively re-enacts them.

The balance of this testimony will focus on the ethical and constitutional basis for prohibiting employment discrimination based on non-citizen status, and the need for strong protection against this danger for all persons authorized to work in the United States.

II. The Ethical and Constitutional Basis for Protection Against Employment Discrimination Based on National Origin and Non-Citizen Status

Lawfully resident aliens have a constitutional right to work. They are "persons" entitled to the equal protection of the laws. In 1915, the United States Supreme Court recognized that lawfully resident aliens have a "right to work in the common occupations of the community," for such a right is the "very essence of personal freedom and opportunity that it was the purpose of [Fourteenth Amendment] to secure." Truax vs. Raich, 239 U.S. 33, 42 (1915). Under a series of well known decisions, the Supreme Court has held that a State may not abridge a lawful non-citizens's right to work except on a showing that such abridgement is necessary to achieve a compelling State interest. This same standard applies to State laws that regulate employment in the private sector.*

These constitutional holdings establish as the law of the land the principle that all persons lawfully residing and authorized to work in the

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* Under more recent Supreme Court decisions, a less stringent constitutional standard may apply to State jobs "imbued with sovereign authority" such as State police or public school teachers. See Foley vs. Connelie, 435 U.S. 291 (1978); Ambach vs. Norwick, 441 U.S. 68 (1979).

United States enjoy a fundamental right to work which cannot be abridged except for compelling reasons. The proposed employer sanctions included in S.1200 and HR.3080 pose a serious threat to this principle. Whereas other federal laws have made it unlawful for an employer to deny employment to persons because of certain personal characteristics, sanctions represent a unique effort to make it unlawful to give employment to persons because of certain characteristics, namely their lack of legal status in the United States. As such, employer sanctions contemplate radical changes in employment practices.

III. The Danger of Employment Discrimination Arising from Employer Sanctions

I am convinced that employer sanctions will increase employment discrimination on several levels, and that non-citizens authorized to be and work in the United States are especially vulnerable. Indeed, as other witnesses have testified, it appears that the mere prospect of employer sanctions, and the substantial publicity which has surrounded the Congressional debate, already have led certain employers to fire or deny employment to persons lawfully here for fear they may be undocumented or otherwise subject the employer to INS enforcement activities. (See attached news articles.)

Even if all parties to the debate can today only speculate about the extent to which sanctions will increase employment discrimination, it is my judgment that Congress should provide protection against the danger. If discrimination does increase, as I believe is inevitable, such new protections will provide an opportunity for protection and redress not available under current law.

If, as their proponents assert, sanctions do not prove discriminatory, such protections will at a minimum affirm Congress's commitment to the principle that all persons lawfully residing in the United States, citizen and non-citizen alike, have a protected right to work.

Consistent with the conclusions of the Commission as set forth in the The Tarnished Golden Door, there are several reasons why I believe that employer sanctions will increase the potential for discrimination on the basis of national origin, race and non-citizen status.

First, the danger of employment discrimination is inherent in the basic character of employer sanctions, which impose upon the employer the obligation to ascertain the right to work of all persons hired. Employers would be mandated to distinguish between job applicants who are lawfully here and authorized to work, and those who are not. This requires employers, under threat of civil and criminal prosecution, to make very difficult judgments about persons seeking employment.

Accordingly, I believe that employer sanctions will foster the creation of a de facto "suspect classification" of persons who look or sound foreign, especially Hispanics, Asians, and other persons, regardless of race or ethnicity, whose appearance, language skills or other characteristics may raise questions about their immigration status. Because the problem of illegal immigration is perceived by many, albeit incorrectly, as a "Mexican problem" or as a problem of Central Americans and Caribbeans, millions of citizens and lawful resident aliens who share a common appearance with persons from these regions will become especially suspect in the minds of employers.

In short, some employers, acting in good faith in an effort to comply with sanctions or minimize the risk of investigation and prosecution, may adopt the simplistic solution of discriminatorily denying jobs to "foreign looking or sounding" persons.

Second, employer sanctions will encourage those who are inclined to discriminate to perceive sanctions as a pretext or excuse for denying employment on invidious grounds.

Third, the "optional verification" requirements of S.1200, and the "mandatory verification" provisions of HR.3080 will not adequately address this potential for discrimination, may indeed exacerbate it, and will give rise to serious threats to privacy and other civil liberties. Under both bills, employers are required to make a subjective determination of the validity of proffered documents. Given the ease with which such documents are forged, and the possible difficulties in assuring that an individual matches the document's description or picture, the easiest way out for employers who wish to comply with sanctions will be to refuse to hire foreign looking or sounding persons, or subject them to much closer scrutiny than others.

Finally, I am concerned that the adoption of employer sanctions, particularly as structured in S.1200 and HR.3080, will result in some employers requiring job applicants to produce a passport or other proof of citizenship. Such practices, authorized under both bills as a means of complying with the verification requirements, would amount to a "citizens only" hiring policy. This would impose extraordinary hardship on the approximately 8 million permanent resident aliens and refugees who reside lawfully in the United States and are authorized to work. These millions of people face the greatest new danger of employment discrimination if employer sanctions are adopted. As discussed below, current civil rights laws do not provide adequate protection against a "citizens only" hiring practice. It is for these reasons that I think it essential that if employer sanctions are included in any immigration law, the provisions of the "Frank Amendment" in the form in which it passed the House by a vote of 404-9 in 1984 must also be included.

IV. Existing Employment Laws Do Not Provide Adequate Protection for New Forms of Discrimination Arising From Employer Sanctions.

In Espinoza vs. Farah Manufacturing Co, 414 U.S. 86 (1973), the Supreme Court held that Title VII of the Civil Rights Act of 1964 does not bar discrimination based solely on alienage or non-citizen status. The Court also stated clearly that discrimination based on alienage is not the equivalent of national origin discrimination, which Title VII does prohibit.

While in some instances the non-citizen lawfully authorized to work might be able to assert a claim of national origin discrimination under Title VII, the facts of Espinoza itself--a Mexican resident alien denied employment on the basis of non-citizen status by a company which predominantly employed Mexican-Americans--demonstrate that Title VII's national origin prohibition fails to address the heart of the problem with which I am concerned.

I recognize that some courts and commentators have argued that Section 1981 of the Civil Rights Act of 1866 prohibits both public and private employers from discriminating against non-citizens solely on the basis of their non-citizen status. It is my understanding, however, that the Federal Circuit Courts have split on this issue, and that the Supreme Court has not resolved the question. Accordingly, Congress cannot reliably determine that Section 1981 provides adequate protection against discrimination based on non-citizen status which sanctions may engender.

To those who argue that Section 1981 does provide adequate protection, I would respond with two points: 1) that implicit in such a conclusion is support for the principle which I urge Congrers to uphold, that all persons lawfully in the country, citizens and non-citizens alike, should have their right to work protected regardless of their immigration status; and 2) that given the sweeping character of employer sanctions, gaps in the coverage of Title VII, and practical difficulties in enforcing both Title VII and Section 1981, it is necessary to adopt the provisions of the original "Frank Amendment" to ensure vindication of the principle of non-discrimination because of non-citizen status.

V. The Need for Protections Such as the House of Representatives Approved in 1984

In order to vindicate the principle that in this society the right to work is accorded to citizens, lawfully admitted resident aliens, and refugees alike, should Congress adopt employer sanctions it is essential that it also prohibit the type of employment discrimination which sanctions will engender. S.1200 is inadequate in this regard. HR.3080 is preferable to S.1200 and I commend Representatives Rodino and Mazzoli for their efforts to address this serious problem. But for several reasons, in my judgment, the best approach is represented by the "Frank Amendment" which the House of Representatives approved in 1984 by a vote of 404-9.

First, HR.3080 limits the protection against discrimination based on national origin or citizenship status to citizens or "intending citizens." The definition of "intending citizen" is limited to persons who complete a declaration of intention to become a citizen, and apply for naturalization within six months of when they become eligible, or within six months of the date of enactment, whichever occurs first.

I respectfully disagree with the "intending citizen" restriction. Protection of the right to work should be accorded to all persons lawfully in the United States, not only those who seek or pursue citizenship. The fundamental character of the right to work is undermined by the restricted scope of the anti-discrimination provisions of HR.3080, and a new "second class" category of residents would be established.

Second, I understand that the "Frank Amendment" authorized class actions, whereas HR.3080 may not. I think class actions should be allowed consistent with the rules of Federal Civil Procedure.

Finally, I am concerned that HR.3080 would limit a private right of action to "knowing and intentional" or a "pattern or practice" of discriminatory activity. These standards are extremely difficult to satisfy, and are unduly burdensome. I recommend that the Committee reconsider these provisions of HR.3080, and return to the approach of the "Frank Amendment" which passed the House overwhelmingly last year.

I again thank both Subcommittees for affording me the opportunity to testify on these important matters.

UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington, D. C. 20425

MAY 11 1983

Honorable Robert Garcia
Chairman
Congressional Hispanic Caucus
H2-557
Washington, D.C. 20515

Dear Representative Garcia:

Thank you for your recent letter expressing the Congressional Hispanic Caucus' continued opposition to employer sanctions. We regret that scheduling problems precluded a meeting with you to discuss the issue but we were able to hear from a number of people representing organizations who have been active in support of or opposition to the Simpson-Mazzoli Immigration Reform Act.

After careful consideration of the civil rights implications of the proposed legislation, the Commission can assure you that it re-affirms the positions and stands by the recommendations contained in its report, The Tarnished Golden Door.

The Commission wants to thank you for sharing the views of the Hispanic Caucus with it and appreciates your concern on this issue.

Sincerely,

FOR THE COMMISSIONERS
PENNY

CLARENCE M. PENDLETON, JR.
Chairman

cc: Office
Chron
OSD (3)

GGerebenics 5/10/83

ngressional
Hispanic
Caucus

[illegible] DC 20515 · [illegible]

Robert Garcia
Chairman
Henry B. Gonzalez
Matthew G. Martinez
[illegible]
Director - Susan [illegible]

May 6, 1983

Mr. Clarence M. Pendleton Jr., Chairman
United States Commission on Civil Rights
1121 Vermont Avenue NW
Washington, D.C. 20425

Dear Mr. Chairman:

As I'm sure you know the Senate is presently considering the Simpson-Mazzoli Immigration Reform Act. Mark up on HR 1510, the House version of this bill, was recently completed in the Judiciary Committee.

While I have several problems with this bill, there is none so disturbing as the employer sanctions provision. This provision, according to its supporters, is key to the bill's matrix. This is not so; there are alternatives to sanctions, as they have been structured in Simpson-Mazzoli.

My purpose in writing you is not to debate the relative merits of these alternatives, but to explain why they are so frightening to Hispanics and other minorities. Simply put, they will provide a defacto sanctioning of discriminatory hiring practices toward minorities.

Sanctions are not designed to discriminate, but their application will lead to this practice. First of all, it is highly unlikely that this nation's majority group when seeking employment will be scrutinized for proper documentation to the extent that a person of color with an accent or a "foreign" sounding last name will be. Sanctions will also be seen as one more stumbling block in the way of getting a job by the chronically unemployed, many of whom are minorities.

Further, sanctions allow an employer to act as judge and jury over prospective employees. Employers can decide who they are willing to "risk" hiring. Lastly, even with a national ID system there is no guarantee that discriminatory practices will not exist. In addition, an ID system will take time to implement and during that time there will be no effective safeguard against sanctions, and the concept of such a system potentially threatens the civil liberties of all Americans.

Because I believe in the civil rights of all Americans, and because I am a minority, I feel a responsibility to fight against sanctions. This is not a new struggle for me. In 1974 as a member of the New York State Senate I led the fight against a bill that would have instituted sanctions. We prevailed then; I will do all I can to see that we prevail now.

Discrimination can be a subtle occurrence. It is not something a non-minority is often aware of or fully understands. Persons of color encounter prejudice each day. While I realize we can't entirely eradicate prejudice through legislation, we should, nonetheless, fight against those laws which would institutionalize prejudice. Sanctions would provide an institutional framework for discrimination-- the hallmark of prejudice.

I understand the last time the Commission took up the question of sanctions it voted against them. I hope, if the issue is again taken up, the Commission will have an even more resounding vote against sanctions.

If I can be of any help or shed further light on this matter please feel free to contact me.

Sincerely,

Robert Garcia

Robert Garcia
Chairman

RG:wxl

TESTIMONY OF ARTHUR S. FLEMMING, CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS BEFORE THE HOUSE SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND INTERNATIONAL LAW

October 21, 1981

Mr. Chairman, members of the Committee, I am Arthur S. Flemming, Chairman of the U.S. Commission on Civil Rights. The Commission is pleased to respond to your request to testify. Accompanying me today are John Hope, III, Acting Staff Director, Paul Alexander, Acting General Counsel, and Donald Chou, Staff Attorney.

The U.S. Commission on Civil Rights examined the proposal being considered by this Committee along with other suggested remedies for dealing with the undocumented worker problem in its national immigration report entitled, The Tarnished Golden Door: Civil Rights Issues In Immigration, which was submitted to the Congress and the President in September 1980.

The Commission in its report recognized the seriousness of the overall problem which this Committee is considering. Our Commission was unanimous in recommending that the following steps be taken.

First, the Commission recommends the vigorous enforcement of the Fair Labor Standards Act and other labor laws "to ensure that neither citizens nor aliens are required to work under unfair working conditions and to minimize job displacement." The Commission believes that this recommendation, by reducing the attractiveness for an employer of choosing an undocumented worker, would help to lower the participation of undocumented workers in the domestic labor market.

Second, the Commission recommends the strengthening of the program of the Immigration and Naturalization Service by authorizing the hiring of additional personnel and through the use of more modern law enforcement technology, such as computerized arrival-departure records.

In the immigration law enforcement area, we also recommend the creation of a Border Management Agency within the Department of the Treasury to separate the two conflicting missions of the Immigration and Naturalization Service--service and enforcement--in the belief that such action will result in focusing additional time and resources on each of those missions.

Third, we recommend vigorous efforts on the part of our government designed to bring into existence bilateral or multilateral agreements or compacts with the major source countries for undocumented workers in order to reduce and regulate the population flow between those countries and the

United States. In making that recommendation, we said in our report that:

> There are precedents for the development of working agreements to deal with the population flow between the United States and the major source countries for undocumented workers. It is recognized that the negotiation of such agreements must be linked with other outstanding issues, the resolution of which would be to the advantage of all parties. Also programs of economic cooperation and development can be worked out in such a way that they further develop the resources required to reduce the need for citizens in source countries to seek work in the United States.

The Commission strongly supports the implementation of this three-pronged approach to reducing the participation of undocumented workers in the domestic labor market. We believe that these recommendations if implemented will move the nation forward in dealing with the undocumented worker issue without jeopardizing our civil liberties.

Another proposed solution to the undocumented worker issue is the enactment of employer sanctions legislation.

Two members of the U.S. Commission on Civil Rights recommended that employer sanctions legislation be enacted, provided that such legislation is coupled with some compulsory national identification system for the verification of the employment eligibility of current and/or prospective employees.

Commissioner Stephen Horn supported an employer sanctions law if it were accompanied by the creation of a "secure and counterfeit-proof social security card" which could be used by employers to prevent the inadvertent employment of undocumented aliens. In his opinion, such an identification document would help alleviate "distressing working conditions in the low-skill, low-wage industries" which employ undocumented workers and "the resultant denial of job experiences for our own citizens." Commissioner Frankie M. Freeman, who resigned as a member of the Commission just prior to the release of the report following 16 years of distinguished service, maintained that it should be made "more difficult for persons entering illegally to secure employment" by developing an identification system "which will minimize or effectively prevent [employment] discrimination against persons legally here."

A majority of the Commission, however, rejected employer sanctions either with or without a national identity card or other compulsory identification system. The majority specifically rejected the adoption of an employer sanctions law for the following reasons:

First, the Commission believes such a law would impose law enforcement duties upon private persons and corporations, with undesirable consequences not only for the employer but for job applicants. Although employers have existing responsibilities under such Federal statutes as the Fair Labor Standards Act, the income tax laws, and Title VII, an employer sanctions law would be unique in that its purpose is not merely to regulate the conduct of the employer but to regulate the prior nonemployment-related conduct of the prospective employee.

Second, such a law would increase employment discrimination against United States citizens and legal permanent resident aliens who are racially or culturally identifiable with major immigrant groups.

Because of the great potential for employment discrimination under an employer sanctions law, some of its proponents have suggested the adoption of a compulsory national identity card, work permit, or other universal identifier.

The majority of the Commission after weighing the pros and cons of this proposal concluded that it:

> raise[s] serious questions about the undermining of civil liberties. The Commission does not believe that, serious as the adverse impact of the undocumented workers may be on the employment opportunities of some citizens and legal aliens, the Nation is warranted in traveling a path which could result in depriving all citizens of civil liberties. The Commission does not believe that the ends that would be achieved justify the proposed means. [*The Tarnished Golden Door*, p. 73.]

The reason for our arriving at this conclusion can be briefly described as follows:

First, the availability of a compulsory national identity card, work permit, or other standard universal identifier would provide the means for a serious invasion of privacy.

The Nation's concern over the individual costs such a compulsory identification document would exact through the invasion of privacy a [illegible] sulting effect this invasion could have on the erosion of other rights, such as the freedom of speech, assembly, and association, was evidenced by the passage of the Privacy Act of 1974. In reporting this legislation to the Senate the Government Operations Committee said its purpose was to curb:

> illegal, unwise, overbroad investigation and record surveillance of law-abiding citizens produced in recent years from actions of some over-zealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies. [S. REP. NO. 93-1183, 93d Cong., 2d Sess. 1 (1974).]

The existence of a national identity card would multiply by many times the opportunities for bringing together in one file information which could constitute a serious invasion of privacy. The increasing governmental and nongovernmental use of the Social Security card number for this purpose should put us on notice as to what could be done with a compulsory national identity card.

Second, compulsory national identity cards, work permits, or other standard universal identifiers would also provide the government with an opportunity to undermine individual rights by confiscating, or by threatening the confiscation of, the card in an arbitrary and capricious manner.

In brief, the majority of the Commission concluded that the nation would not be justified in traveling the untried paths of employer sanctions and a national identity card knowing that in so doing it would be jeopardizing seriously equal employment opportunity programs and the civil liberties of all our people.

Dragnet for Illegal Workers

Miscues and poor planning in a search for scapegoats

Anthony Spinale, owner of G & T Terminal Packing, Inc., in New York City, was startled when armed agents from the U.S. Immigration and Naturalization Service (INS) burst through the door last Monday. "They came in like Jesse James, covering this door, covering that door," Spinale said. "I thought it was a holdup." The agents arrested 18 of Spinale's workers, who had been packing fruits and vegetables for grocery-store produce counters, and took them away. Reason: the INS thought they might be illegal aliens.

Across the country, similar raids were conducted last week as a special strike force of 400 INS investigators and Border Patrol officers fanned out to search for undocumented workers in a $500,000 operation dubbed Project Jobs. In five days, more than 300 raids netted nearly 5,400 such workers in nine metropolitan areas.* The targets were supposed to be businesses paying considerably more than the minimum wage of $3.35 an hour, not the usual farms and restaurants. "We felt it would be good to center on these areas where we think the higher-paying jobs are held by illegal aliens," explained INS Spokesman Vern Jervis. "These kinds of jobs seem to be attractive to unemployed Americans." To help U.S. citizens get those jobs, the agency tried to keep local employment offices abreast of what businesses had been raided and how many jobs had opened up.

From the start, Project Jobs was plagued by miscues and poor planning. Alerted to the impending sweeps by news reports, some workers stayed away from their jobs to avoid encounters with INS agents. Some skilled illegal aliens were found employed as steelworkers and machinists, but many of the raids were on businesses offering mostly low-paying, menial jobs. The raids often seemed more trouble than they were worth. In the Detroit area, for example, 40 sweeps netted a grand total of 34 illegal aliens. At the Utica Packing Co., some 30 miles north of Detroit, 20 agents rounded up 24 suspected aliens in a search that effectively shut down the meat-packing plant for several hours and cost its owners an estimated $8,000 in lost business. As it turned out, none of those taken into custody were in the U.S. illegally. All were back at their jobs by the next day.

An INS team stormed Detroit's Frederick and Herrud pork-processing plant, hauling off 33 workers. There, the bad feelings that greeted the agents everywhere across the U.S. took a comic twist when two gun-toting INS men rushed through a door into a holding area only to be charged by a herd of angry hogs. The terrified officers escaped by swinging across the rafters, Tarzan-style. None of the 33 arrested were illegal aliens.

INS investigator frisking suspected illegal alien in California

"They were not looking for Poles or Italians or Greeks."

The operation drew heavy fire from civic, business, religious and Hispanic groups. Charged Ira Glasser, executive director of the American Civil Liberties Union, in a letter to President Reagan: "The Administration ... is scapegoating undocumented workers in an effort to shift the blame for [its] dismal failure to cope with increasing unemployment." Glasser and other critics further suggested that the sweeps were timed to garner congressional support for the Simpson-Mazzoli immigration-reform bill, which is aimed at slowing the flood of illegal aliens (an estimated 1 million last year) entering the U.S. Among other things, the bill would for the first time impose criminal penalties on employers of illegal workers. Other critics suggested that the INS was trying to justify its proposed 22% funding increase, from $428.6 million to $524.6 million, in the President's fiscal 1983 budget.

Equally disturbing were charges by Hispanic groups that INS agents had unfairly singled out Spanish-speaking workers. Some of the week's biggest raids were conducted in Southern California, and 83% of those arrested last week were Mexicans, who make up only about half of all illegal immigrants in the U.S. "They were not looking for Poles or Italians or Greeks," charged Juan Soliz, 32, attorney for Chicago's Mexican-American Defense and Education Fund. "They were looking for people who looked Mexican." Some employers reported that INS teams simply arrested all their Hispanic employees.

In several cases, U.S. citizens were detained for up to twelve hours. Among them was a twelve-year-old boy who was apprehended as he left a grocery store in Colorado. One unidentified Hispanic man was run over by a truck and killed when he fled INS agents at an egg-packing plant in Boulder, Colo. Fear among Hispanics was running so high that church groups in some communities were offering food and sanctuary to people who were afraid to leave their homes.

Many critics of the operation feared that it would fuel anti-Hispanic and anti-immigrant prejudices at a time of economic uncertainty. In a telegram to Attorney General William French Smith, California's Democratic Senator Alan Cranston warned: "The raids are sowing dangerous seeds of racial and ethnic conflict." Hispanic groups charged that the raids would make businessmen hesitant about hiring Hispanics. In fact, some employers involved in the raids admitted reluctance even to take back workers who managed to prove their legal status to arresting officers.

INS officials in Washington called the operation a success, citing reports of Americans lining up for the jobs vacated by illegal aliens. But the big question was whether the new workers would stick with the jobs. The signs were not encouraging. At the Petaluma Poultry Co., some 55 miles north of San Francisco, hundreds of applicants vied to replace 18 chicken pluckers who were arrested. By week's end 14 of the 18 new employees had quit. After a much publicized raid in which 53 fish cleaners were arrested at the Point Saint George fishery in nearby Santa Rosa, 20 local job seekers came around, but none wanted to clean fish. They all wanted to drive trucks.

Most Americans would probably agree with the INS's premise that illegal workers should not be stealing jobs from U.S. citizens. But last week's sweeping police action left a sour taste, especially in view of its meager returns. The arrest of a few thousand people seemed a curious way to reduce the number of unemployed (10 million) or illegal aliens (some 3 million). *—By Janice Castro. Reported by David S. Jackson/Washington and Alessandra Stanley/Los Angeles, with other bureaus*

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*New York, Los Angeles, Chicago, Houston, Detroit, Dallas, San Francisco, Denver and Newark.

Latinos Feel Impact of Immigration Bill Even Before It's Enacted

LA Times

Some Employers Weed Out Illegal Aliens

JUN 19 1984

By LAURIE BECKLUND, Times Staff Writer

Although it may be weeks before final congressional action on the Simpson-Mazzoli immigration bill, the proposed legislation already is prompting precautionary measures by some employers that, in some instances, have aroused complaints of discrimination against Latinos in the Southwest.

In California, some employers have begun laying off illegal workers, and others say that they are demanding more documents of job applicants to protect themselves from immigration raids and the possibility of fines or other penalties under Simpson-Mazzoli.

In addition, the owner of an Orange County die-casting factory, convinced that Simpson-Mazzoli may be the straw that breaks the camel's back after a decade of rough economic times, is quietly conducting feasibility studies to see if he should relocate abroad, where he can take advantage of cheap labor.

The bill is also having some unpredictable effects. A Dallas apartment manager, apparently believing that the bill would require him to evict illegal aliens, sent out a notice in English last month to his mostly Spanish-speaking tenants warning them that anyone who failed to provide proof of legal residency would be turned over to the U.S. Immigration and Naturalization Service so the apartment owner would "stay in compliance with the law." Several tenants moved out.

The House of Representatives is scheduled to resume debate today on the Simpson-Mazzoli bill. The legislation envisions civil penalties for employers who knowingly hire illegal aliens and an amnesty for illegal aliens who can prove they have been living in the United States continuously since Jan. 1, 1982. But many details, including the controversial issue of amnesty for illegal residents, are still up in the air.

"We've been getting lots of calls from members concerned about how this bill will affect them," said Louis Custrini, vice president for communications of the California-

Please see LATINOS, Page 8

WEATHER

U.S. Weather Service forecast: Today through Wednesday—night and morning low clouds with local drizzle; mostly sunny in the afternoons.

	Highs	Lows
Monday	80	65
Today's forecast	78-82	62-65
Wednesday's forecast	78-82	62-65
June 18 last year	80	65
Record high June 18, 1957		104
Record low June 18, 1965		47

Complete details, Part IV, Page 21.

based Merchants & Manufacturers Assn., which represents 3,000 employers. "But no one really knows. It's awful hard to gauge the impact of the bill—especially given the fact that we don't know the exact form it will take."

"Our clients have been wringing their hands over immigration bills for so long they're wrung out," said one immigration expert who advises about 40 manufacturers and other employers. "We've advised our clients just to maintain a wait-and-see posture."

But some employers, threatened by immigration raids or by economic pressures, do not feel that they have that luxury. Based on their experiences, these employers predict that, in the short run, the legislation could lead to layoffs of persons suspected of being illegal aliens and, in the long run, to the relocation, automation or even closure of factories.

Some Latino leaders charge that confusion over the proposed bill already has led to cases of increased animosity toward Latinos in some areas of the Southwest.

Requesting Green Cards

"We have already experienced employers requesting citizenship papers or green cards of all Mexican-American people applying for jobs—mainly in the service industry areas like hotels and restaurants," said Johnny Mata, Texas director of the League of United Latin American Citizens. "We think this is because of the threat of Simpson-Mazzoli."

Star Kist Foods, in deep financial trouble from foreign competition and a depression in the tuna industry, recently dismissed at least nine Terminal Island cannery workers it suspected of being illegal aliens as a result of threats of immigration raids that could further disrupt production, Vice President Ed Ryan said.

The dismissals prompted a protest by more than 200 persons last Thursday. Several of the employees had seniority of 10 years or more, protesters said. Some were near retirement, and one was a mother who was pregnant with her third child. The workers were fired after refusing to comply with a company order to

Amnesty Provision

Ryan said that he is prepared to "create jobs" for the nine fired workers if Simpson-Mazzoli is enacted and grants amnesty to some illegal aliens. Because Star Kist has not hired any workers for two years, Ryan said, the firm's entire work force could become legal if the current amnesty provision in Simpson-Mazzoli becomes law.

Mike Spinelli, vice president and general manager of Aluminum Precision Products, an aerospace forging operation in Santa Ana, said that he laid off 32 illegal immigrant workers in 1983.

The move was a precautionary measure; he had been warned by the U.S. Immigration and Naturalization Service of a possible raid on his factory.

Had a major raid occurred, he said, he might have lost many more members of his skilled work force. The company has refused to hire any new illegal aliens, he said, and has taken the additional precaution of hiring employment counselors to advise current employees on immigration law and how to defend themselves if caught in a raid.

Screening Applicants

What is more common than dismissing workers suspected of being illegal aliens is screening out job applicants who do not show proof of citizenship or legal residency.

Donald Sutherland, regional vice president and manager of the new Intercontinental Hotel in the Houston Galleria said that the hotel has begun demanding that job applicants present "proof of U.S. citizenship or a residency card."

"Immigration raids might cause you to lose some good employees, and then you have to go out and rehire," he explained. "It is less costly to start out with people you are not going to lose."

Like many employers, he said he began asking applicants for documentation not just because of Simpson-Mazzoli, but because of "an awareness . . . about the tremendous influx of illegal aliens coming in and applying for jobs."

ExAMPLE #1

BEST COPY AVAILABLE

Legal Protection

Although such employers say that screening appli-nts gives them a shield of legal protection in case npson-Mazzoli is enacted, some complain that the w legal workers are less satisfactory than the illegals. Others confide that they fear they are discriminating ainst Latino applicants.

"Because of the possible fines under Simpson-Mazzo- we decided to comply in not hiring illegals last year," d the personnel director of one sizable Los Angeles hicle manufacturing plant who asked that the mpany not be identified. "We made a statement that ne of our current work force would be affected but at new people would be screened."

Times staff writers Ralph Vartabedian in Los ngeles and Ramo Tempest in Houston contributed this article.

Because many green cards and other identification rds used by illegal aliens are fraudulent, she said she rticipates in a program that the INS calls Operation ion. If an employer decides to participate in the o , he uses an INS hot line to verify the legality of cuments supplied by job applicants. In return, the INS nerally avoids raiding those workplaces.

Playing It Safe

But, because the INS computer is often down and are clogged, the personnel director said that she up hiring non-Latinos to "play it safe."

"I hate to say this, but I'm sure there have been a lot times that I've discriminated against Latinos," she id. "Sometimes you just don't have time to wait for the mputer. If I have four applicants for the job, I would turally incline toward the one that's not Latino . . . . ost employers would just rather play it safe than get to trouble with INS."

Because of the new screening process, the company ayroll has dipped from about 75% Latino to roughly 0%, she said.

One unexpected side-effect of such scrutiny, she said, that the new legal employees she hires have poorer tendance records than the illegal aliens the company nce employed.

Aluminum Precision had similar complaints, Spinelli id. Although wages have increased, worker absentee-m has increased, and work force turnover has soared 25% annually.

Employers in other labor-intensive industries fear that they will be unable to find replacement workers willing to take the low-paying jobs they have to offer.

"I was hit by the INS," said an Orange County die-caster who refused to be named. "I feel I'm legal at this point. But I am very close to relocating abroad, and I know others who are, too. It's not just Simpson-Mazzoli. It's that we've been competing with cheap foreign workers for a long time now. And we just can't afford to pay higher wages to attract American workers."

"It's very hard for us to get workers," agreed Bernard Brown, vice president of the Coalition of Apparel Industries, which represents 600 employers with 125,000 workers statewide. Although Brown said that industry sources have no way of knowing exactly how many of those workers are illegal aliens, it is often estimated that as many as 80% of the seamstresses in the garment industry are illegal. In many such plants, English is rarely, if ever, spoken.

Because the women work in large rooms whose exits can be blocked by immigration agents (unlike hotels or restaurants, which also are believed to employ large numbers of illegal workers), garment factories are considered cost-efficient targets for raids by INS.

Retaining ID Records

To preclude disruptive raids and prepare for Simpson-Mazzoli, Brown said, his coalition sent out notices last month recommending that its members retain photocopies of whatever identification job applicants present.

"We've asked for Social Security cards, and, second, if they're Latinos or look like Latinos, we've asked for green cards," he said. "So, we've complied with the law as it stands now. . . . The burden of proof would be on the government (to establish that the employer knew the employees were illegal al iens)."

But one garment contractor with 8 employees who spoke on the conditio that he not be identified said that h thinks at least 90% of his seamstresse are "probably illegal," even though h has ID cards for all of them.

"A lot have been with me for years, he said. "I can't fire them if Simpson Mazzoli passes. And, even if I did fir them, there's no guarantee I could re place them. No high school graduate i going to take these jobs. My averag wage is maybe $5 an hour, piece rat There's no upward mobility. I can't mak these jobs attractive."

More Imports Seen

The contractor said that he is countir on a generous amnesty provision th would legalize the vast majority of h workers. If amnesty is denied, he predic that many garment contractors will cro their fingers and hope that the INS w be too overwhelmed to hit them all.

If enforcement is stiff, he said, "m guess is you'll find more importing they close down our labor force, wh other alternative do we have? Th second possibility is that we wou probably look to automate."

Meanwhile, many employers indica that they are willing to go to bat for the most senior illegal employees. One L Angeles employer who asked not to b identified said that he has about 12 illeg workers whom he is prepared to suppo against the INS if they are ever arreste The dozen workers, who include supe visors, are essential to his manufacturi operation.

"These people have been here sin before there was a green card," he sa "They have raised children and se them through college. Are we prepar to bail them out? Yes. Are we prepared pay their legal fees? Yes."

Mr. MAZZOLI. Mr. Keatinge.

Mr. KEATINGE. We appreciate this opportunity to appear here this morning on behalf of the American Bar Association to share the ABA's views on pending immigration reform bills and particularly on the generally sound antidiscrimination provisions in H.R. 3080. I'm accompanied this morning by Mr. David Carliner, who is a member of the ABA's coordinating committee on immigration, of which I am the chairman.

While the ABA remains opposed in principle to employer sanctions, we've concluded that such sanctions will, in fact, be part of any reform bill. Thus, conceding the inclusion of sanctions, we are committed to the inclusion of antidiscrimination provisions to guard against any discriminatory hiring practices resulting from sanctions. My brief comments will be limited to the issue of sanctions as they relate to antidiscrimination provisions. My prepared statement touches on other issues, and I would request the statement be included in the record.

Mr. MAZZOLI. Without objection.

Mr. KEATINGE. With respect to sanctions, as we testified in the last Congress, we oppose sanctions in part because we fear that employers will discriminate in hiring in order to avoid the imposition of sanctions. The inclusion in H.R. 3080 of sanctions and antidiscrimination provisions recognizes this point.

We believe the burden remains on proponents of sanctions who oppose such antidiscrimination language to show that there will be no such discrimination. That proof has not been forthcoming. We also feel that sanctions in H.R. 3080 could be improved by including the "sunset" provisions which the Senate included in S. 1200.

Turning to discrimination, the premise of sanctions is that aliens will be drawn to the U.S. for employment. Similarly, aliens lawfully in the United States are both encouraged and required to work, because it is part of our ethic and because we do not wish to expand social welfare costs. Thus, for those aliens lawfully in the United States, we are obliged to provide a minimum amount of protection against discriminatory hiring practices. Not to provide such basic protection defeats the whole purpose of requiring employment as a condition of remaining in the United States.

Present Federal statutes and case law are either insufficient, unclear or unsettled. Turning first to title VII, it is clear from *Espinoza* v. *Farah* case in the United States Supreme Court that title VII does not furnish any protection against discrimination based on alienage. That was specificly stated by the court when it said, and I quote:

> Aliens are protected from illegal discrimination under title VII, but nothing in title VII makes it illegal to discriminate on the basis of citizenship or alienage.

Others have stated that there are protections given by section 1981 of the 1866 Civil Rights Act. The contention is made that this particular section will, in fact, give protection against employment discrimination based solely on national origin. The tenth circuit has found that it does, the seventh circuit has found that it doesn't.

With respect to the question of whether section 1981 prohibits discrimination against aliens based on alienage, the only circuit court to consider the question found that it does. That's *Garrow(ph)*

v. *Manchester Terminal Corporation.* On the other hand, there are two Federal district courts, one in the northern district of California and one in the Southern District of New York, holding that it does not provide such protection. Furthermore, neither of the two States with the largest estimated undocumented alien populations, either California or Texas, have any protections prohibiting an employment discrimination based on alienage or citizenship.

Furthermore, there are no mechanics provided to implement section 1981. In other words, the bill as proposed by this committee provides for machinery in the Department of Justice that we would suggest that it perhaps could stand improvement with providing that there is review at the level of the Attorney General, but basically there is a procedure provided for which if somebody agrieved can seek redress.

Summing up, then, in our view if some of these decisions provide sufficient protection, then there would appear to be no reason not to assure such protection by the kind of language that appears in H.R. 3080, which clarifies the standard and establishes the procedures and machinery. Our main point here is that the law is nothing if not certain. Even employers who might not agree with the proposed new section 274(B) would, I suspect, prefer it to unclear and uncertain case law and a myriad of litigation.

[The statement of Mr. Keatinge follows:]

STATEMENT OF RICHARD H. KEATINGE, CHAIRMAN, COORDINATING COMMITTEE ON IMMIGRATION LAW, AMERICAN BAR ASSOCIATION

Chairmen Mazzoli and Simpson and Members of the Subcommittees:

My name is Richard H. Keatinge and I am a lawyer in private practice in Los Angeles. I have the honor to chair the American Bar Association's Coordinating Committee on Immigration Law and also serve as the delegate of the ABA's Section of Administrative Law to our policy-making House of Delegates. I am accompanied by Mr. David Carliner, an immigration law expert who is a member of my committee and who also serves on the governing council of the Section of Administrative Law. I very much appreciate your courtesy, Mr. Chairman, and that of Mr. Endress in arranging for our appearance. It is an honor to join such distinguished company in helping to fashion needed immigration reforms, doubly so for us because we are here representing of the President of the American Bar Association.

The American Bar Association long has been involved in reviewing substantive immigration laws and the procedures by which they are enforced and in making recommendations for their improvement. This involvement began in 1949 and continues. When our House of Delegates approved a package of immigration reform recommendations in February, 1983 the House also established the Coordinating Committee I now chair. The committee is composed of two representatives each of the Sections of Administrative Law, Criminal Justice, General Practice, Individual Rights and Responsibilities and International Law and Practice and one representative from the American Immigration Lawyers Association. The charge of this broad-based group is to coordinate the varied and often competing interests within the Association in an effort to implement the Association's adopted policies through the enactment of needed immigration reforms.

This diversity has resulted in vigorous debate and the expression over the past two years of strong opinions within the Coordinating Committee. However, its composition and our internal differences have proven to be a strength. Throughout our deliberations and our efforts to fashion the dozens of ABA policies into a cohesive approach to immigration reform the Association's single guiding principle has been, in the broadest sense, the need to enact immigration reforms which are in the best national interest of the United States.

The legal profession has a special responsibility to improve immigration laws and processes. Thus, while I am here today to reiterate in the strongest possible terms the commitment of the American Bar Association to promptly enact reforms we think are needed, it is perhaps more important to assure that our deliberations result in laws that are in fact enforceable, which will be enforced and which are fair and generally are perceived to be fair. The very existence in this country today of untold millions of undocumented or otherwise illegal immigrants is testament to the failure of some or all of the standards of enforceability, enforcement and fairness.

With that background, Chairman Mazzoli, we are pleased to commend your continuing leadership and that of your Senate colleague, Senator Simpson. The legislation Chairman Rodino and you have introduced, H.R.3080, is a further refined version of that which the House approved last year. H.R.3080 is preferable both to last year's bill and to the version of S.1200 which was approved by the Senate on September 19. While we will suggest aspects of H.R.3080 which we think could be revised, and although we do not fully agree with all of the assumptions on which your bill is based, we think H.R.3080 generally is a more balanced approach to immigration reform.

The specific subject of today's hearings is the anti-discrimination language of H.R.3080. Thus, we will first address that issue and the related subject of employer sanctions. Thereafter, we will outline the ABA's views on other aspects of H.R.3080.

I. Employer Sanctions and the Need for Anti-Discrimination Language

The American Bar Association opposes the imposition of penalties on employers who knowingly hire immigrants illegally in the country or lawful immigrants not authorized to work. Since this proposal first was approved by the House of Representatives and, in slightly different forms approved by both houses on a number of subsequent occasions, a number of concerns have persisted.

The ABA continues of the view that the burden of proof is on the proponents of such significant changes in our employment laws and practices. We think the proponents of sanctions have failed to demonstrate that the implementation and enforcement of sanctions by employers and by the federal government will not result in discrimination against U.S. citizens or lawful immigrants authorized to work, and that the burden and costs on the private sector of implementing a program of sanctions will be disproportional to their effect.

The burden is not on the opponents of sanctions to demonstrate the likely consequences of as-yet unenacted provisions. It is, I reiterate, a burden necessarily borne by the proponents.

The questions we and others have raised are not trivial. Although we continue to disagree, we commend you, Mr. Chairman, for your attention over the years to these difficult questions. As Father Theodore M. Hesburgh said in his supplemental statement to the 1981 final report of the Select Commission on Immigration and Refugee Policy, "The essential question is how to make such a law work without having it discriminate against minority groups, disrupting the work place or placing too great a burden on employers and eligible employees."

In truth, Mr. Chairman, the opponents of employer sanctions are just as unable to definitively prove that employer sanctions will result in all of the ill-effects we fear just as the proponents of sanctions are unable to definitively demonstrate that such sanctions will accomplish all of their stated goals without any ill-effects. Such is our predicament. Thus, it appears to be the responsibility of us all to fashion an overall revision to the immigration laws which the best evidence suggests will accomplish certain ends.

Any perceived or likely ill-effects, especially where they concern discrimination against American citizens in the workplace, must be protected against even if such feared results never occur. Not unlike being immunized against measles, a patient need not be guaranteed by the doctor that measles will result in the absence of immunization -- most of us only need to know that immunization will almost surely protect us if we are exposed to the disease. So anti-discrimination protections are essential to this bill if only to protect against a result we all hope will never occur.

The ABA, however, suggests that criminal sanctions need not be part of this bill. Whatever one's view of employer sanctions it has always seemed to the ABA that the establishment of penal sanctions was simply an excessive response to the alleged violation. As has been demonstrated in other criminal laws, if judges and juries think that the penalty for the commission of a certain crime is excessive they are more likely than not to find the accused innocent. If the accused is in fact guilty of the offense this process can do nothing but to foster disrespect and disregard for the law. Thus, removal of the criminal sanctions provisions from H.R.3080 and S.1200 would lessen the likelihood that employers might undertake discriminatory hiring practices to avoid criminal penalties.

If employer sanctions are crafted in such a way as to be enforceable and if they are implemented in such a way so that they are in fact enforced, they will have only partially met their purpose if they are unfair and discriminatory to various minority workers. Proposed new Section 274B included in H.R.3080 is, generally, a helpful and appropriate response to the concern of many observers that the imposition of sanctions will in fact foster discrimination against foreign-appearing workers in excess of the discrimination against such persons now. It is this perception of unfairness, if not its fact, that undoubtedly had an impact on the ultimate failure of the 98th Congress to pass legislation. Although we note the changes in the comparable provisions of S.1200, we think the language in H.R.3080 is more clear and is more likely to be effective.

The American Bar Association disagrees with assertions that strong and definitive anti-discrimination language would necessarily require U.S. employers to hire non-citizen workers over citizens. We would not support such an approach. What we do support is a clear, unequivocal prohibition against employment discrimination backed by the enforcement of the executive branch of government. For persons lawfully in the United States whom the government has authorized to work, the fact of their U.S. citizenship or lack of U.S. citizenship should be an irrelevancy in the hiring process. The mechanism must be instituted to authorize the federal government to prosecute discriminatory employers who, for instance, establish a pattern or practice of hiring only U.S. citizens t the knowing exclusion of non-citizens as well as employers who have a pattern or practice of hiring only authorized but non-citizen workers to the exclusion of citizens. The concern about discrimination has been before the Congress at least since the 1981 report, and specific formulations have been debated by both houses of Congress.

It is the law, confirmed in numerous U.S. Supreme Court decisions, that with specific exceptions states may not accord different rights and privileges to non-citizens than are accorded to citizens. Some distinctions have been upheld and others have not. It seems to us that the national government should not follow a different standard than that followed by the states. If authorized immigrants must be available to serve in our armed forces, then our national policy should be that those same persons may not be denied other employment because of their status.

It has been suggested that the experience by France and other European countries has not demonstrated that the existence of sanctions promotes or even induces discriminatory hiring practices. This may be correct. However, none of those countries, of course, experience such a large amount of illegal immigration, both in terms of numbers and as a percentage of all illegal immigration from a neighboring country sharing a common border as the United States does with the Republic of Mexico. Nor do any of these countries have such a substantial population of citizens whose origins were in the country responsible for such illegal immigration as the United States does with its citizens of Hispanic origin. These are important considerations suggesting caution in comparing the experience elsewhere with what might happen here.

The ABA's House of Delegates has not specifically addressed the various anti-discrimination proposals which have been advocated. The Coordinating Group which I chair, however, was directed by our policy makers to oppose employer sanctions because of their discriminatory potential. Thus, we favor proposals to discourage such discrimination initially and, if it occurs, to make it grounds for prosecution. The ABA understands the difficult dilemma faced by the subcommittee in considering anti-discrimination language which theoretically could have results beyond those intended to forestall discriminatory hiring practices. Consequently, Mr. Chairman, the ABA Coordinating Committee pledges to work with you and others concerned about potential discrimination in an effort to fashion in legislative language the clear policy of the Government of the United States that hiring discrimination against persons authorized to work will not be tolerated.

Should employer sanctions, if enacted, ultimately result in no discrimination, then the American Bar Association will be the first to express its relief. But if such sanctions should result in any significant discrimination which can in fact be tied to the existence of sanctions, then the failure of any legislation to include adequate machinery to deal with that discrimination will be a serious undercutting of the future effect of sanctions. There is no reason to avoid instituting anti-discrimination machinery if one is convinced it will never be needed. There is every reason to insist on the inclusion of such provisions if it is possible that they might become necessary. The provisions of H.R.3080 meet these concerns.

Finally, Mr. Chairman, all of the issues you have so commendably tackled over the years concerning employer sanctions will, in large measure, not be fully understood until such sanctions are enacted. Because the debate surrounding immigration reform is so difficult -- as you know better than anyone -- any problems that might result from this legislation will undoubtedly be difficult to rectify because of the understandable reluctance of Congress to again enter this fray. Thus, the American Bar Association strongly encourages you to seriously consider including a simple sunset review requirement as part of H.R.3080. The purpose of such a requirement is to force Congress and the public to fully review the experience with sanctions. Only if we are all forced to return to this table in, for instance, five years will the experiment with sanctions be worthy of your effort. We can think of no objective reasons not to include such a sunset provision -- if sanctions are demonstrated as limiting the influx of illegal immigrants and are not discriminating against persons authorized to work in the United States, there will most certainly be no interest or incentive to do anything but continue sanctions. If sanctions are not meeting their promise and are being implemented with a discriminatory result -- or if they merely need some mid-course fine tuning -- then it would be difficult to imagine anybody who would oppose such a legislative change. In all events, a law as controversial as sanctions must be revisited periodically and with close scrutiny and we all must be forced to do it.

II. Other Elements of Needed Immigration Reform

The deletion from last year's bill of a number of provisions which the ABA favored or opposed has, we think, helped make H.R.3080 a more focused bill. Some of these provisions are, in our view, elements of needed reform, and their omission from H.R.3080 should not be viewed as lessening their importance.

Thus, the ABA expressed the strong view over the past two years -- a view still held -- that improvements in the immigration system even without legalization and employer sanctions, and most certainly with those two major additions, require the decisional independence of administrative law judges. We supported the call last Congress for the establishment of a United States Immigration Board, but we differed with the Justice Department when we emphasized the importance of administrative law judges being independent from the Attorney General and having the decisional independence requisite to fair fact-finding and dispute resolution. Our support for an independent United States Immigration Board takes on even greater force if the current system is further burdened with disputes concerning employer sanctions and legalization. However, the deletion of the United States Immigration Board from H.R.3080 and S.1200 reduces the areas of disagreement among all parties to the search for reform. We would urge that legislation establishing a fully independent United States Immigration Board, however, be high on the agenda of additional immigration reforms to be considered in the near future.

On the other side of the coin the American Bar Association had great difficulty with a number of the asylum adjudication provisions included in last year's legislation. Similarly, the removal of those provisions from H.R.3080 and S.1200 will likely remove stumbling blocks as it will permit all of us to more carefully review our nation's standards for admission of refugees and the manner in which we seek to comply with our international obligations on the subject.

The important but very difficult question of legal immigration remains part of H.R.3080, but the ABA is concerned that these provisions may detract important attention from the illegal immigration provisions. In passing, however, I would urge the inclusion in H.R.3080 of the proposed pilot visa waiver program which is included in S.1200, and which we hope will generate the kind of information necessary to implement a full visa waiver program.

In addition, we note the appropriateness of authorizing additional sums of money through 1987 for increasing the strength and professionalism of the border patrol and for other federal enforcement activities. To return to my opening theme, even if legislation is fashioned which is enforceable and fair, it will do little unless it is, in fact, enforced. The American Bar Association commends these efforts and, particularly during a time of national budgetary restraint, will continue to support your efforts in obtaining the needed resources for the enforcement of our immigration laws.

The final element of pending legislation -- legalization -- is of course a hallmark of this legislation and one of the most controversial and difficult provisions we are addressing.

As the Select Commission correctly concluded, strengthening enforcement measures against illegal immigration, so as to decrease the number of illegal immigrants entering the United States, is a necessary adjunct to legalizing a substantial percentage of those unauthorized immigrants now in the United States. As an advocate of legalization you know better than most the benefit of legalization and the importance of instituting such a program. The benefits to our nation are best understood by reviewing the alternatives to immediate legalization. First, even in the absence of employer sanctions there is nothing to suggest, and we have heard no testimony that does suggest, that the resources of the United States government are capable of even identifying the untold millions of undocumented immigrants in the United States, much less prosecuting and deporting them. It comes as close as anything to being an impossible task, and you and the Select Commission and the ABA and most other observers recognize this. Even if it were possible, such a massive attempt at deportation would, as the Select Commission noted, "be destructive of U.S. liberties, costly, likely to be challenged in the courts and, in the end, ineffective." The report observed that if such a deportation campaign as was undertaken in the mid 1950's were repeated, "such an effort would not be tolerated today and . . . would almost certainly violate the rights of many legal residents without reaching more than a small proportion of those aliens lacking proper documentation."

Second, if the United States is unwilling or unable to enforce the law against the millions of undocumented immigrants now in the country, is it a satisfactory solution simply to do nothing? Again to quote from the final report of the Select Commission, "the existence of a large undocumented/illegal migrant population should not be tolerated. The cost to society of permitting a large group of persons to live in illegal, second class status is enormous. Society is harmed every time an undocumented alien is afraid to testify as a witness in a legal proceeding (which occurs even when he/she is the victim), to report an illness that may constitute a public health hazard and to disclose a violation of U.S. labor laws."

If the status quo is unacceptable and if the law is unenforceable, then it seems to the American Bar Association as it has to those more knowledgeable, such as the Chairman, that legalization enacted at the same time enforcement is strengthened is the only possible response, the only humane response and the response best serving our collective national interests.

To reiterate our past expression of a legalization program, it is the ABA's view that the national interest is best served -- and the basis for increased enforcement best established -- if the slate is wiped clean for a substantial number of currently undocumented immigrants.

Such a program would, as Father Hesburgh has observed, have a cut-off date about three years prior to the date legalization is instituted. Thus, we recommend changing the January 1, 1982 cut-off date in H.R.3080 to January 1, 1983. We urge you to reject the recommendation of the Attorney General to institute a 1980 date. We also think that the deferred legislation provided for in S.1200 should be rejected, and the provisions of H.R.3080 adopted.

A one-year legalization program would provide sufficient time for church and community organizations and bar associations to assist the INS to assure the undocumented population of the government's intention to offer legalization to as many as possible. It would also make clear that the program would not be renewed. A single-tier program would be less costly for the government to implement. To minimize both fraud by applicants and unauthorized decisions by government officials, some minimum reviewability of denials of legalization should be instituted. The definition of continuous residence, and exceptions thereto, the degree of Justice Department discretion in fashioning regulations and, perhaps, the role of the Community Relations Service in implementing sanctions, all are issues the ABA is reviewing. We will be pleased to work with you to resolve these questions.

I conclude where I began, by commending this subcommittee for sticking to this difficult and often uncomfortable task you have assigned yourself. The House version of immigration reform before us today is, as indicated, preferable than prior versions because of its more limited focus; it is also preferable to S.1200 for the reasons indicated. The observations and suggestions we have offered are the result of continuing efforts on th Association's part to be a constructive participant in the process of improving our nation's immigration laws. In particular, as you might imagine, the practical necessity of acknowledging that sanctions will be a part of any legislation is difficult for us to admit, but we have done so. The inclusion of the kind of anti-discrimination language as is in H.R.3080 will substantially reduce our concern about sanctions.

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Mr. Mazzoli. Mr. Keatinge, thank you. You win first prize.

Let me yield myself 5 minutes to begin the questions. And let me begin, first, by doing just a little bit of housekeeping in line with what we have announced, the need to adhere to the 48-hour rule. I feel constrained to say that in this panel the city of Chicago is 8 hours late in submitting its testimony, Mr. Flemming was 9 hours late. It may sound insignificant; and it is, in this case, not an impediment to our preparing the testimony. But I, again, would ask for future panelists and people to adhere to the 48-hour rule, simply because it gives us an opportunity to analyze and prepare the questions. So, I thank you for your appearance and your general recognition of that rule.

The question of sunset. Everybody seems to be in favor of "sunseting" on employer sanctions. If the House is disposed to approve a Barney Frank formulation in antidiscrimination, would you support a "sunset" to that?

Mr. Reyes.

Mr. Reyes. Can you repeat that last part of the question?

Mr. Mazzoli. Would you be in favor of "sunseting" any kind of Frank antidiscriminatory language which might be approved by this committee or the House?

Mr. Reyes. I think, in terms of our position, we would be willing to go along with the "sunset" amendment. If there were a more stringent kind of deadline and the automatic kind of termination we would also be in support of that kind of thing.

Mr. Mazzoli. Congressman Garcia?

Mr. Garcia. I would be willing to go along with the "sunset" of the Frank Amendment if there's also "sunset" in the employer sanctions provision as well. You cannot do one without the other, and "sunset" by itself is insignificant.

Mr. Mazzoli. The symmetrical part of it——

Mr. Garcia. And if I may, just one second, if I Mr. Chairman——

Mr. Mazzoli. Yes.

Mr. Garcia. I'm not as much concerned about the House of Representatives as I am about the Senate, and I'm delighted that Senator Simpson is here, because it's there that I'm concerned about whether, in fact, the "sunset" provision could be eliminated. I think that we could probably work something out in the House, but in the Senate, it seems to me that it will be much more difficult to get a "sunset" provision through on both employer sanctions and the Frank amendment.

Mr. Mazzoli. Mr. Flemming.

Mr. Flemming. I agree with Congressman Garcia.

Mr. Mazzoli. So, the symmetry holds true, if you have a "sunset" on employer sanctions you'll accept that, the kind of "sunset" that you've described, an automatic "sunset" on the Frank amendment?

Mr. Flemming. Correct. The Frank amendment is designed to deal with the problems that arise as a result of employer sanctions. If employer sanctions disappear, why of course, the antidiscrimination provision that was included to deal with employer sanctions would also disappear.

Mr. **Mazzoli**. Well, let me ask Mr. Keatinge, how does the ABA stand on that? Would you be for "sunsetting" in a symmetrical fashion?

Mr. **Keatinge**. I think you have to. I think, as a practical matter, the two fit together. The reason you have the anti-discrimination provision in here is that there are employer sanctions.

Mr. **Mazzoli**. Well, then, I guess that gets to what Mr. Flemming said, which is more or less my second question.

What are the "raps" on this whole idea of going into the Frank formulation and to do more than was done in a basic bill to protect against unintended discriminations—the fact that we don't really know if there is discrimination being practiced in the community on an alienage basis. I gather from your testimony that you say that there is not that, now, discrimination based on alienage, because it would only occur with the imposition of employer sanctions.

Is that your feeling, Mr. Flemming, that there is not now in the community alienage discrimination?

Mr. **Flemming**. I think Congressman Garcia is in a much better position to respond to that than I am, but on the basis of my experiences as a member of the U.S. Commission on Civil Rights, I would not say that it doesn't exist in any cases at the present time. I think that there is, undoubtedly, built into our present discriminatory picture some situations of that kind. My feeling is that employer sanctions would accelerate that.

Mr. **Mazzoli**. Let me ask you this, then. If, for example, what we've heard up to now is that there is no effective remedy in current law for alienage discrimination, when a "sunset" occurs, and the Frank language goes off, and employer sanctions goes off, what happens to the people then who we have heard all morning are the victims of alienage discrimination?

Mr. **Flemming**. I think that that experience may very well say to the Congress that consideration should be given to some amendments to title VII.

Mr. **Mazzoli**. Congressman Garcia.

Mr. **Garcia**. With the permission of the chair, I've got a list of examples of alienage discrimination. I don't know if they were entered, if anybody entered these.

Mr. **Mazzoli**. I think they haven't been, and I would like to.

Mr. **Garcia**. Well, then, with the permission of the chair, what I would like to do is to enter these examples of alienage discrimination as my part of the testimony, because I think I can go through a whole list and I don't think you should——

Mr. **Mazzoli**. Bob, what we're saying is that alienage discrimination exists today, and apparently there is no remedy for it. Is that the feeling?

Mr. **Garcia**. I believe that alienage discrimination exists, and I think that employer sanctions would amplify that discrimination. What I'm saying is, there is alienage discrimination today; if employer sanctions become law, that discrimination will be worse.

[The examples of alienage discrimination follow:]

EXAMPLES OF ALIENAGE DISCRIMINATION

1. Rejection or Refusal to Consider:

Permanent resident alien Gustavo Fuentes eliminated from consideration for D.C. law firm because he was not a citizen. (Told by Fuentes to Sen. Simpson at ABA Conference).

Latina woman denied employment despite having proof of permanent resident alien Status. (From D.C. attorney Martha Saenz-Schroeder).

Employment doors closed to permanent resident alien with Masters from M.I.T. (From D.C. attorney Denise Sabagh).

2. Current Employees told to verify status, a prove citizenship, or apply for citizenship.

Three permanent resident aliens employed by Webb County, Texas told to apply for citizenship or lose their jobs. (From MALDEF in San Antonio).

In response to INS raids, Vincent Lozano and other Hispanics employed by California firm told to prove citizenship. (From Vincent Lozano).

3. Applicants told to verify status before their application will be considered. Illinois firm requires applicants to take verification form to INS before application will be considered. (From Chicago employment counselor Onelia Limes-Miller).

4. Citizenship Preferred. Ethiopian refugee who has since become a permanent resident alien told "citizens [illegible]" when applying for job with Federal Excepted Service.

5. Citizens or Permanent Residents Only. Some D.C. area firms refuse to recognize H-1 temporary work authorization permits. (From D.C. attorney Denise Sabagh).

6. Employers Don't Understand Law.

(See number 5 above.)

California firms thought Simpson-Mazzoli would have applied to current hires. (Los. Angeles Times, june 19, 1984).

7. INS has poor Recordkeeping.

Oregon man spends 3½ months proving to INS its own error in refusing to recognize his green card number. (From Oregon Legal Services Corporation).

INS claims no record of area applicants for political asylum (temporary work authorized). (From Virginia attorney Michael Mckenzie).

Mr. MAZZOLI. My time has expired.

The gentleman from Wyoming is recognized for 5 minutes.

Senator SIMPSON. Well, I again apologize for having to leave, and I understand there were some references to my remarks in the debate in the Senate, at least in this area. Mr. Chairman, let me just for the purposes of the record insert one page which says everything that Al Simpson said on September 13 on that one issue. It just fills this one page, and I think that's appropriate.

Mr. MAZZOLI. Without objection.

[Mr. Simpson's remarks follow:]

[From the Congressional Record, Sept. 13, 1985]

Mr. SIMPSON. Mr. President, again that has been a thoughtful review of a tough and puzzling issue. I remember well the Hart-Levin amendment or the Levin-Hart amendment in the last debate on this issue. What we are talking about is a new set of machinery in the Federal Government, a set of machinery that was rejected in previous civil rights legislation. I think that is what people want to remember here. This is in essence, if I am not mistaken, and I ask the sponsors if I could be corrected, the Frank amendment or great parts of the Congressman Barney Frank amendment, my former colleague from Massachusetts. Is that not what is embodied here?

Mr. HART. My recollection of the sponsorship in the House is not quite clear, but it is the amendment passed overwhelmingly by the House.

Mr. SIMPSON. I thank my friend and neighbor from Colorado. It was presented to the House on the basis that it was an antidiscriminatory piece of legislation, and indeed it is. It passed overwhelmingly very late one evening after another significant vote that preceded it. That is the Hart-Levin amendment proposal.

I say to you that the mechinery in it, and what it creates, a separate system within the Government, a separate agency, was rejected during the civil rights debates of the past or it would have been part of the civil rights laws of the present.

I have always resisted it on the basis that if we are going to do civil rights legislation, let us do it, but let us not do it on an immigration reform bill where now, especially with what Senator KENNEDY has proposed and I have agreed to, there is a remarkable assurance that discrimination will not take place.

Again, I want to be sure that everyone is hearing clearly what we are talking about. We are not talking about discrimination based upon color of skin or national origin. Those things have been covered so magnificently by Congress in the past and will in the future remain covered.

We are talking about the thing called discrimination based on alienage, which is puzzling to scholars, and so, in a sense, vague, that some of the great civil liberties of both Houses of Congress have not even dealt with it in the past 20 years. That is what makes it such an extraordinary, puzzling issue.

To do it in an example form so that people really do understand what we are talking about is very simple: I am an employer and two people are standing before me for a job. One is a United States citizen and the other a Canadian with a green card allowing him to work in the United States. I pick the U.S. citizen. I am subjected to a suit through the machinery of my Government by the permanent resident alien on the basis that I have discriminated against him or her on the basis of their alienage.

I do not think the American people are ready to favorably consider that and its ramifications.

The other ramification is if you have a colony of permanent resident aliens who like to hire permanent resident aliens, they will no longer be able to do that. They must hire U.S. citizens.

That is why we are going to have a hearing on it—because it is absolutely necessary we have a hearing on it. That is going to be a joint hearing. Congressman MAZZOLI and I are going to hold that hearing. It is my understanding it has been set.

I wish it could have been done before we proceeded on this bill, but all of us who have legislated know that as these windows flop open and close in this curious arena, you grab the hook as it goes by. We are going to be on the farm bill and the Superfund, and so on. The immigration window opened and we proceeded.

I have assured my colleague for Michigan and I assure my colleague from Colorado that will have another window for presentation of their concerns after we review the transcript of that hearing—either a resolution, a sense-of-the-Senate resolution, or whatever may be required to address the issue of discrimination based on alienage. The proposed amendment deals with both national origin and alienage discrimination. The bill, especially as amended by Senator KENNEDY, offers extensive protection against national origin discrimination:

First, an employee who complies with the verification procedures is afforded an affirmative defense against the penalties.

Second, an employer who wishes to discriminate is still subject to the penalties of the Civil Rights Act of 1964.

Third, the bill requires GAO to monitor the implementation of employer sanctions and report on any discrimination.

Fourth, if a pattern of discrimination arises, an antidiscrimination task force must develop legislative recommendations that are reviewed by the Congress in 60 days.

The ultimate solution is the new antidiscrimination procedure: Special provisions to permit the Congress to act to repeal or amend employer sanctions in a 30-day expedited procedure.

Senator SIMPSON. And then, Mr. Chairman, let me enter into the record the letter from Clarence Pendleton which was in response to an inquiry from Congressman Berman, which, I think, answers that. That was to me, dated October 9. That was not received since then, I had that in my possession.

Mr. MAZZOLI. Without objection.

[Information follows:]

U.S. COMMISSION ON CIVIL RIGHTS,
Washington, DC, October 9, 1985.

Hon. ALAN K. SIMPSON,
U.S. Senator,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR SIMPSON: This will respond to your inquiry concerning whether the reconstituted U.S. Commission on Civil Rights is bound by or endorses in any way the policies of the previous Commission.

Following statutory enactment of the new Commission, the members voted that the Commission was not bound by the positions of its predecessor. This policy, of course, also applies to the matter in which you are presently involved, viz., reform of the Nation's immigration laws.

Based on the information before it at the time, the old Commission voted to oppose employer sanctions as a means of stemming the tide of illegal immigration. While those who were Commissioners at that time are free to express their opinions, of course, it should be made clear that they are not representing the current Commission.

In the event that the Commission decides to look into the pressing issue with which your Subcommittee is attempting to deal, we would obviously want to begin our inquiry by examining the data on which the old Commission based its findings and recommendations in "The Tarnished Golden Door: Civil Rights Issues in Immigration."

Sincerely,

CLARENCE M. PENDLETON, Jr., *Chairman.*

Senator SIMPSON. Then, I'm not going to ask any specific questions of Bob Garcia. He is a powerful advocate, I respect him greatly. He and I have been on forums together, we've kicked it around in every known way. There isn't a person I respect more, and what I admire about him is he knows we have to do something, and we have to do the humane thing, because whatever we do, if we do nothing it is not going to be humane. Because eventually, in doing nothing the status quo will continue.

Now, I would like to ask a question of Mr. Reyes, because I read your testimony and you speak about the Chicago Employment and Training Office receiving calls asking it not to refer Hispanics for hiring, that Chicago travelers and immigrant aid groups and Hispanic communities have detected job rejections because of INS's Operation Cooperation, and that INS in Chicago apprehends people merely because they appear foreign.

Could you please describe for me—and I seek this information—how these incidents constitute alienage discrimination? And, in addition, could you please describe for each of these cases that you've cataloged, how the discrimination was specifically not actually one of national origin discrimination?

Mr. REYES. In terms of the experience that we have encountered in the city of Chicago with regards to our employment and training office, one is that we started receiving calls from employers, realizing that the law had not taken effect but that they were under the impression that something happened, so that we started receiving phone calls. On a different occasion we had groups and members from the INS office in the city of Chicago just stopping people that were coming into a city facility. Some of those individuals that were stopped, were stopped and asked, "What are you doing? What do you want here?" were people that were employed by the city of Chicago, that were Hispanic, that had no reason whatsoever to be stopped by anybody to be asked what was their business on that property, or what were they doing there, or what have you.

I think that if you're going to look at the question of alienage discrimination, just to stop individuals because they may look like they're from a different country, or they may not be citizens, regardless of not having a criterion or not, I think that begins to develop a case for discrimination, just on the way that people look, just on the way that people sound. I think that's how you could categorize the——

Senator SIMPSON. I know that, and that is done in America. And what I keep focusing on is discrimination based on alienage. That is the issue, that is the only issue. We are not talking about looking foreign, or brown, or black, or anything else, and that's why I keep bringing this focus back, we're talking about discrimination based on alienage alone. I want to know where it is in America.

I know there is discrimination in Chicago. It is the largest interior location of illegal, undocumented persons in the United States, and I admire you for grappling with the problem. If we ever get a bill, we will legalize a great myriad of those people; but we never seem to get a bill, because perfection seems to get in our way. So, 2 to 12 million hangup in the United States, kind of stuck in the craw of the United States, while we look for perfection from a dazzling array of people who really, supposedly, care and are true civil libertarians. That is always the most fascinating thing for this old cowboy. I have not seen anything here in this testimony that leads me one whit away from just knowing that when we've circled in on discrimination based on alienage, we have simply found a hook, a magnificent shunt, if you will, for those who don't want to do anything at all but still want to sound like they do.

I guess my time has expired.

Mr. MAZZOLI. I'm sorry.

If there is a response, the time has expired, but Mr. Reyes?

Mr. REYES. Yes, just getting back to the question at hand, just the fact that individuals walking to their office buildings get stopped, based on assumptions made by employees of the Federal Government, and, again, without a criterion, because I would tend to doubt that a person that works in the city of Chicago for the INS division or regional office there, could not tell the difference between a Puerto Rican individual, a Mexican individual, and a South American individual. And to have anybody stop, based on assumptions or some kind of criteria that has been created in an individual's mind who has developed that kind of mind set, I think you need to address that question.

Mr. MAZZOLI. The gentleman's time has——

Senator SIMPSON. I do, too. We have for 20 years.

Mr. REYES. But this still exists, that individuals will get stopped and individuals will get asked these questions, and their applications may not be reviewed or evaluated for employment, regardless of the question of whether they are a citizen or not a citizen.

Mr. MAZZOLI. Thank you. The gentleman's time has expired.

The gentleman is recognized for 5 minutes.

Mr. FRANK. Thank you, Mr. Chairman.

I have never before sat and contemplated my "sunsetting." I just want to make sure that my tenure is allowed to survive that.

I would just say I think you put a perfectly reasonable question; and, yes, if the sanctions were a "sunset" of course the amendment would "sunset." But I do have to take exception to what my friend from Wyoming has said. His statement that my amendment is a shunt for people who really want to kill the bill is simply not true. I don't think I'm someone who is simply trying to kill the bill. I offered that amendment, I was prepared to negotiate over it. I think we arrived last year in negotiations which are a reasonable compromise. I share the preferences of those at the witness table for the amendment as originally offered; and it wasn't pride of authorship, because I didn't write it. For some time after I had agreed to offer it, I didn't even read it. I read it when it became clear the bill was going to come to the floor, and having read it, I was impressed with it, and I would have preferred it in the original form. But it was hardly, in my case, an effort to simply get rid of this bill.

Second, it's a mistake to characterize it only as alienage discrimination, because we have two other issues: one, coverage of employers between 3 and 15. Now, that's something that's not in the bill, it's not in the EEOC. The head of the Civil Rights Commission of the United States says, "Well, if some discrimination comes up later down the road, you'll do that." I think that is unacceptable. So, we're talking about whether or not we should cover people between 3 and 15.

We're also talking about whether the Equal Employment Opportunity Commission, as currently structured, is an adequate vehicle. Whether or not the potential for discrimination from employer sanctions, which I support, employer sanctions that I voted for and will continue to support, whether that doesn't require some special degree of expertise. So, I think it is simply inaccurate to say this is simply a question of alienage. There is the question of alienage, there is also the question of the proper vehicle.

Now, I want to ask, and let me talk a little bit about the proper vehicle, because I think it is interesting. I mentioned this to the Chamber of Commerce. They have opposed every proposal to protect anybody from any form of employment discrimination. I don't think there was a U.S. Chamber of Commerce when the 13th amendment was ratified, and I don't know what their position was on that if they were there. But I think if they were for the 13th amendment, as they probably were, that was the last time they were for anything like that.

But I want to ask, because one of the things we're saying is, well, you can overdo this. And a spectre is being conjured up, which often happens when we deal with discrimination, that tries to ridicule it. My friend from Wisconsin said, "Well, wouldn't this lead, or might this lead," he asked the chairman of the Civil Rights Commission, "to someone being forced to hire for a retail position someone who didn't speak any English?" I think that is preposterous. I think the gentleman knows that. No one is arguing that you would be forced, under the alienage discrimination restriction to hire someone to deal with the general public who did not speak English, and I assume that people here would make that affirmation. I don't think we have any allegation or anything in the language that would support that argument.

Mr. **Sensenbrenner**. Would the gentleman yield?

Mr. **Frank**. Yes.

Mr. **Sensenbrenner**. I've read your amendment, and there is no occupational exception in this bill. That's why I asked the question that I did.

Mr. **Frank**. I understand that, but the fact that there was no occupational exception doesn't mean that you are guilty of alienage discrimination if you don't hold someone who doesn't speak English. Because people not speaking English is not what we're talking about here. We're talking about whether or not you are a citizen, and it would deal with whether or not you are a citizen.

You don't think that's a serious issue, and I think it trivializes that process to bring up these kinds of scare tactics. We do have a serious thing we ought to work on, we ought to work on it seriously.

But I would just like to ask the panel, this is a variety of people here who have significant experience in antidiscrimination: the chairman of the Civil Rights Commission, deputy mayor, a legislator who's been a champion of people who have been mistreated, people with expertise in the bar association. Historically in America, these last 20 years, have we over enforced antidiscrimination statutes? Have we an interrorum situation now, where innocent and well-meaning employers are frequently protecting them, and we told the EEOC, "We've got all the laws on the books now that we need"?

I wonder what your experience has been with our efforts to protect people against discrimination on any of the existing bases.

Mr. FLEMMING. Congressman Frank, in my judgment, of course, we have not over enforced, we have under enforced. And in the whole area of equal employment, it seems to me that one principle we've adherred to strictly is that we are not going to attempt to defend the rights of a person who is not qualified to perform the duties and responsibilities of a particular job. The allegation is made, from time to time, that affirmative action plans require people to hire people who are not qualified to perform those duties. That is not the case.

Mr. FRANK. And even if it were, there's not affirmative action proposal here. We're simply talking about stark nondiscrimination, not affirmative action. I appreciate that.

Mr. FLEMMING. I would use that as an illustration.

Mr. MAZZOLI. The gentleman's time has expired.

I don't think the gentleman from Wisconsin needs any defense from me, but I really don't necessarily think any question asked trivializes, because I have some problems, myself, with similar details.

Mr. FRANK. Will the gentleman yield to me?

Mr. MAZZOLI. I happen to have—the staff did look up something about the English language, and I think the gentleman from Massachusetts is correct, that, basically speaking, current law, at least for the larger employers, would, establish that while speaking English at all times is not absolute—cannot be required, that an employer may have a rule requiring that employees speak only English at certain times, which would be like when you're dealing with the public.

So I think, from that standpoint, that the gentleman is correct, that probably current law would not allow the situation the gentleman from Wisconsin brought up to be an existing problem to an employer; but looking for the details of how something will work in practice, which, I think, was the essence of what the gentleman was saying, is, I think, a fair inquiry, and I guess, when we come right down to it, when we have markups and discussions, I think that will obviously——

Mr. FRANK. I would like to respond if I can.

Mr. **Mazzoli**. Certainly.

Mr. **Frank**. I'd have to disagree that it's a fair inquiry to put up what everyone knows is a straw man. Yes, I'm interested in the details, and we did a lot of discussion of the details during the conference, we changed it substantially. We changed it in terms of double jeopardy, we changed it in terms of pattern and practice. I've looked forward to doing that.

Mr. **Mazzoli**. Class actions or——

Mr. **Frank**. My point was that—and I think, frankly, we too rarely around here say what we really mean—I think it does trivialize it to suggest that you're going to be guilty of discrimination under this amendment because you don't hire someone to work in Macy's who can't speak any English. That doesn't mean that there aren't serious things to talk about, but I think that we detract from the serious things when we get into these kinds of scare stories.

Mr. **Mazzoli**. The gentleman from California.

Mr. **Lungren**. Thank you, Mr. Chairman.

I may be asking a question at the risk of being considered trivial. As I understand what we're talking about, current law allows those particular exceptions because there is a statutory exception, there is a statutory occupational exception. There are statutory exceptions with respect to English language, where it is part of the occupation that is not contained in the formula before us. And, so, I think it is important, if we think those things are straw men and we're worried about those defeating the bill, that consideration of amendments of that sort be taken seriously.

First of all, I'd just like to say to Congressman Garcia, I congratulate him for being extremely open in his testimony at the very beginning, that he has opposed and continues to oppose employer sanctions, and oppose the bill even with the expanded Frank amendment last time around.

I would just like to ask the other panelists. Mr. Reyes, I understand you are here on behalf of the mayor of Chicago—whether the mayor would support the bill if the Frank amendment were a part of it, with employer sanctions.

Mr. **Reyes**. Again, if—and we laid it out in the testimony, that if this is going to be part and parcel.

Mr. **Lungren**. No. Excuse me, I only have 5 minutes, too, so I'd just like to have a "yes" or "no" answer.

Would the mayor of Chicago support the bill if we had the Frank amendment in it? That means would he accept employer sanctions with the Frank amendment?

Mr. **Reyes**. I think—and I, just very quickly—if that's going to be part of the bill, then in a limited way, and we laid that in the testimony.

Mr. **Lungren**. That still is not my question.

My question is: Would he support the bill, would he support employer sanctions, if we had the Frank amendment in it?

Mr. **Reyes**. Probably not.

Mr. **Lungren**. Mr. Flemming, with whom I've served on panels together, would you support an overall immigration bill if it had employer sanctions in it but included a Frank amendment?

Mr. **Flemming**. As far as the employer sanction issue is concerned, if it had a Frank amendment in it, I would go along.

Mr. **Lungren**. You would, good.

Mr. Keatinge.

Mr. **Keatinge**. The answer is yes.

Mr. **Lungren**. I appreciate that.

I know in some of the testimony that Congressman Garcia gave, you talked about the hysteria that existed in anticipation of the law. And I saw those articles, too. I come from the part of the country where some of that occurred. But I saw the hysteria and received the claims and exclaims of fear on the part of members of the Hispanic community who were here illegally when we didn't pass the bill, who saw their last best effort or opportunity for legalization go down, who cried on the phone to my staff when they found out that was it. And you and I are both politicians, you know we need a compromise. And I'm not going to ask your opinion, but it's my feeling that we're never going to get legalization unless we have employer sanctions as part of the total package.

Mr. **Garcia**. May I just, if I may? I realize you only have 5 minutes.

There's no decision that's been tougher for me in the 20 years that I have had in elective office than deciding between employer sanctions and legalization. I don't take this very lightly. You're absolutely right. It was a decision based, as far as I was concerned, on my own moral judgment to see if one outweighed the other. If you had calls, I had hundreds of calls, and it broke my heart.

I hope that we can get a legalization program through. I know that even if we get the legalization program through with the sanctions, those people who we're trying to help today will not be able to get the employment that they're here to seek. And that's the problem.

Mr. **Lungren**. Well, I appreciate the gentleman's remarks, because I understand his deep concern and I hope he understands my deep concern.

Mr. **Garcia**. I do.

Mr. **Lungren**. And I'm not going to support any bill unless there's legalization in it. I have some real concerns about having a triggered legalization. I think it ought to be contemporaneous.

I also think a point made earlier with respect to the greatest protection that I could see against discrimination would be mandatory coverage of the paperwork burden of businesses. I had the amendment adopted on the floor last year that required that. That's a difference that I have with the Chamber of Commerce. But when you say that the Hispanics are this generation of immigrants, I understand, in a sense, what you're saying. But I was on the border just 2 weeks ago. I talked with border patrol officers down there. They have found people from 51 different countries coming into this country.

Mr. **Garcia**. Yes, OTM's.

Mr. **Lungren**. They got terrorists who came into this country. They've got Chinese that are coming into this country from Mexico. It's not merely Hispanic immigration, both legal and illegal; in my part of the country it's worldwide illegal immigration right now. And for that reason, I think we do need a universal paperwork requirement, because then you won't have the possibility of an employer saying, "I'm going to make a distinction between this person and the other."

The last thing I'd just say is this, I believe there is discrimination in this country based on a fear of foreigners. I do believe that exists. But it is my firm belief that that fear will only get stronger as long as we don't have a new immigration policy in this country. And I've searched my mind and my conscience, and I don't think we'll ever have an effective one without employer sanctions. So, I think we're all trying to do the same thing, we're just coming at it from different approaches with some different conclusions as to the details. And with all respect to the temporary chairman right now, I think details are extremely important and not trivia.

Mr. **Frank** [presiding]. I want to respond. I don't know why the gentleman would suggest that I think details are unimportant. I don't think it comes in very good faith for him to suggest that. I think details are very important. I've worked on the details, I think the gentleman knows that, and this repeated suggestion that I'm not——

Mr. **Lungren**. No, no, no.

Mr. **Frank**. Interested in the details is simply not at all constructive.

Mr. **Lungren**. No, my point was the occupation.

Mr. **Frank**. Well, the basic occupational qualification isn't relevant here because this bill doesn't deal with linguistic discrimination. It doesn't prevent you from refusing to hire anyone, no matter what his or her background is if they can't speak English, in this situation under the national origin provision, so that's why it doesn't come up very often.

Mr. **Sensenbrenner**. Well, will the gentleman yield?

Mr. **Frank**. Does the gentleman insist that that is a serious issue?

Mr. **Lungren**. I believe it is a serious issue in some cases.

Mr. **Frank**. Well, if it were——

Mr. **Lungren**. Because, in certain cases, we have created an occupational exception for other types of antidiscrimination provisions because these things do come up.

Mr. **Frank**. Well, to reassure the gentleman about the serious fear that they're going to be forced on people, obviously we could put in—it occurred to them last year; if it occurs to them now, we could put in an amendment that would be unanimously agreed on.

Mr. **Lungren**. I appreciate that.

Mr. **Frank**. It is obviously not the kind of thing that gets involved in the bill, it's being used as a stick to try and kill the whole idea.

Mr. **Lungren**. Well, we want to have it in the bill——

Mr. **Sensenbrenner**. Will the gentleman yield?

The gentleman has been impugning my character for the better part of the last 10 minutes.

Mr. **Frank**. No; I'm talking about your judgment, not your character, but I'll be glad——[Laughter.]

Mr. **Sensenbrenner**. Well, will the gentleman yield?

I'm new on this subcommittee, and everybody who has complained about employer sanctions has said that sanctions would be leveled against people who came in speaking with a Hispanic accent or people who only spoke Spanish and were not proficient in the English language. And it seems to me that when we're dealing with this entire subject, we've got to go back to the argument that is made against having employer sanctions, and it's largely a linguistic argument.

So, my question this morning of Chairman Pendleton was not a trivial question, because we're getting back to the basics, and that is to figure out how to have effective employer sanctions without discrimination against people who are legitimately entitled to work in the United States but just speak Spanish or speak English with a Spanish accent.

Mr. LUNGREN. Mr. Chairman, I think my time has expired.

Mr. MAZZOLI. The gentleman from California is recognized for 5 minutes.

Mr. BERMAN. Thank you, Mr. Chairman, I don't have an opinion on the question of the gentleman from Wisconsin.

I do want to say, initially, in response to something Senator Simpson said: The representative from the American Bar Association is from Los Angeles; he and his wife are prominent civic leaders there. I don't think that they would—I don't think Arthur Flemming would be advocating positions that they felt were shunts, ways to kill a bill, without saying they wanted to kill the bill. It's something I would do, but I don't think they would do that. [Laughter.]

Mr. MAZZOLI. I admire the gentleman's candor. I had suspicions along those lines, myself, and I just didn't want to say.

Mr. BERMAN. If we're getting into bottom lines—and the gentleman from California was—if he would add to the question of whether you would support this bill with employer sanctions if it had the Frank amendment, and if you added, "and take out the special treatment that agriculture is getting under this legislation," then come by and talk to me. And I would only ask that the representatives from the ABA and the former distinguished head of the Civil Rights Commission and Cabinet secretary also focus on that aspect of this legislation in coming to their conclusion. Because there are provisions in this legislation that are totally contradictory in concept to what this legislation is designed to do. They want to stop the displacement of American workers, and for agriculture in particular we provide a potentially massive foreign guest worker program at a time of huge unemployment.

Yes, Mr. Flemming.

Mr. FLEMMING. Congressman, in responding to Congressman Lungren's question, I indicated that I was responding on the employer sanction issue, I was not responding to the total bill that is before the House; because there are other issues, obviously, before the House about which I have a deep concern, and you've identified one of them. But I'm saying that as far as the employer sanction issue is concerned, that if the employer sanction section contained in the Frank amendment is included then I'd go along; very reluctantly, but I would go along.

Mr. BERMAN. I appreciate that.

I would like to ask either Mr. Flemming or Mr. Keatinge: The gentleman from California has said he thinks that with respect to the discrimination problem, which he concedes, in concept, does exist, when you go into a new world of employer sanctions there will be an incentive for employers to make sure they don't incur liability, and that could result in some discriminatory practices. He thinks the way around it, you don't need the Frank amendment once you have mandatory verification recordkeeping requirements.

I'd be interested in anyone's, anyone on the panel, response to the notion that that, in and of itself, mandatory requirements that would apply to all applicants for jobs would be sufficient to overcome any potential for discrimination.

Mr. **Keatinge**. Let me try and answer the question. I think that mandatory verification is a desirable addition to the bill. I don't think it deals directly with the problem we have at hand. Even if you have mandatory verification, you can still have the problem of discrimination based on alienage or citizenship. And it seems to me that adding a mandatory verification will be helpful to the whole—the whole scope of the bill would eliminate a lot of the technical and litigating problems that you're likely to run into if you don't do that. So, I would say that I agree with Congressman Lungren that you should have mandatory verification, but I don't think that deals directly with the problem.

Mr. **Berman**. Anybody else?

Mr. **Garcia**. If I may, not to respond to that, but, Howard, if you would just permit me, I would like to ask Mr. Sensenbrenner.

On the question of language, it is important that we both understand that in the United States there are approximately 3,500,000 people who are American citizens whose primary language is Spanish, and those are Puerto Ricans, and they are Americans, born under the American flag. It is important, in the context of that conversation, that we understand this.

Mr. **Sensenbrenner**. Yes. And a concern that I have, Mr. Garcia, is that with the separate statutory scheme that the Frank amendment embodies, is that the person who claims national origin discrimination as a Puerto Rican, being a U.S. citizen by virtue of birth in this country, has got significantly fewer rights under title VII than under the Frank amendment if someone was a Mexican coming in claiming alienage discrimination.

Mr. **Garcia**. Right.

Mr. **Sensenbrenner**. And I think that, in terms of actual prosecution of claims of discrimination, the Frank amendment puts the U.S. citizen born in Puerto Rico, speaking Spanish as a first language, at a significant disadvantage than the Mexican who comes across the border, is not a U.S. citizen, and loses a job because his primary language is Spanish. And that's the concern that I've got.

Mr. **Mazzoli**. The gentleman from Wisconsin is recognized for 5 minutes.

Mr. **Sensenbrenner**. I have a few questions of Mr. Keatinge, since I'm more concerned about the procedural due process of this than the "let's make a deal" arguments that have been going on with some of my colleagues behind me.

Could you tell me why, in your opinion, a separate statutory scheme is necessary to adjudicate complaints of alienage discrimination rather than utilizing title VII, which has been used for age, race, creed, national origin, and sex discrimination?

Mr. **Keatinge**. Well, I would say, that if the committee feels that it is politically feasible to have it in EEOC, either as a separate division or as part of EEOC proper, it strikes me as a citizen and a taxpayer that it would be better to have it in that one agency rather than to have a separate agency. I understand from discussions I heard from others that there are some political problems with that. That's something we're not qualified to pass on. But technically, it seems perfectly possible for me to add this function, this activity, to EEOC.

Mr. **Sensenbrenner**. Does it disturb you that someone who is filing a complaint of alienage discrimination comes under a statute that provides substantially broader coverage and more expedited procedures than one who files a complaint under title VII based upon race, religion, national origin, and——

Mr. **Keatinge**. Yes; I would say it does concern me. I think you can make the argument that these are immediate employment problems that an alien needs to have solved immediately without the time-consuming process that you go through in an ordinary EEOC complaint. But the argument, I think, is reasonable, that they all ought to be handled on a par.

Mr. **Sensenbrenner**. Of course, everybody's own personal employment problem is something that is very urgent.

Mr. **Keatinge**. Right.

Mr. **Sensenbrenner**. Beauty is in the eye of the beholder.

I also am concerned about the feature in the Frank amendment; for example, that does not provide for within-agency review of administrative law judges' findings, which is unique, as well as the fact that the administrative law judges that are established by the Frank amendment have got the power to award attorneys' fees, whereas ALJ's and other agencies do not.

Does that discrepancy concern you?

Mr. **Keatinge**. It does, Congressman. I think, if you remember, a few minutes ago I referred to the fact that there should be internal agency review in the sense of having the ALJ's decisions go up to the Attorney General if you're going to keep this present structure. In other words, the ALJ should not be left hanging out alone. I think this comes from the fact that the original Frank amendment, in the original version of it we had a U.S. immigration board provided for. That's gone by the boards. Now that that's gone, you have a series of ALJ's who are sort of hanging out there in the air, responsible to nobody, and able, as you've indicated, to award attorneys' fees and do a lot of other things.

It seems to me that in accordance with usual agency practice, their decisions would be reviewed by a superior authority. Whether it is a commission or whether it's the agency head in the case of a single-headed agency, we think that should be.

Mr. **Sensenbrenner**. Now, counselor, with all of these problems that I've outlined, you see equal protection and procedural due process problems with the statutory scheme posed in the Frank amendment?

Mr. **Keatinge**. I think you get equal protection and due process out of this procedure. You can suggest another and better procedure, but I think you get due process out of this procedure.

I'm not saying you couldn't have a better procedure, I tried to indicate that.

Mr. **Sensenbrenner**. OK, thank you very much.

Mr. **Mazzoli**. The gentleman's time has expired.

Mr. **Carliner**. If I could just supplement the answer somewhat. The ABA has been very much concerned with the due process which the Congressman has referred to, and if Mr. Sensenbrenner were to introduce an amendment to the legislation to provide for the due process protection which he has alluded to, the ABA would support it, specifically——

Mr. **Sensenbrenner**. I'm afraid it would be called trivial by some on the other side, however.

Mr. **Carliner**. Well, the American Bar Association would not regard it as trivial.

And, specifically, you referred to the administrative law judges. We do not have administrative law judges within the Immigration and Naturalization Service, they're a species known as immigration judges. We have urged for 35 years that there be administrative law judges, and a political decision has been made not to include administrative law judge procedures within this present legislation. If you can persuade the majority of your colleagues to support that, we would favor it.

One additional item that I would like to say, that merely because there are people who have greater rights as aliens than people who have claims of discrimination because of sex, race, or religion, doesn't mean that other people shouldn't have them. We would favor legislation to give equal rights to the persons who claim discrimination because of these other factors; it's not a reason for denying it.

Mr. **Sensenbrenner**. Thank you.

Mr. **Mazzoli**. The gentleman's time has expired.

The gentleman from Texas is recognized for 5 minutes.

Mr. **Bryant**. Thank you, Mr. Chairman. I would like to ask Mr. Flemming or Mr. Keatinge, whoever is the most able civil rights law expert among us here, this question.

It seems to me that the current state of the law without the Frank amendment would clearly allow an employer to advertise and to hire one group of legal alien workers of a certain national origin, let's say from Sweden or Europe, and not hire and discriminate against another group of legal alien employees, let's say, from Mexico, particularly those employers with less than 15 employees, if we don't have the Frank amendment. I would be curious to know if you agree with my reading of the law there.

Mr. **Keatinge**. I would agree with your law. I tried to comment on that in my presentation.

Mr. **Bryant**. I'm sorry I missed that. I was in another subcommittee meeting at the time.

Mr. **Keatinge**. Yes.

Mr. **Bryant**. Well, I just think that is something to be guarded against. I don't think we've addressed that very much in the hearing today. We did with some previous witnesses, and since I was not present to hear your testimony, I won't burden the committee with a bunch of questions.

Mr. **Keatinge**. I tried to indicate why I felt the existing law was inadequate and where the holes were, based on the existing case law.

Mr. **Bryant**. Good. Thank you.

I yield back my time.

Mr. **Mazzoli**. I thank the gentleman.

The gentleman from Wyoming is recognized for additional questions. He had to be called away for a vote.

Senator **Simpson**. Thank you, Mr. Chairman. I know we have a witness that must appear before 1:30.

I wanted to just ask Mr. Keatinge, because I've always had a problem with the American Bar Association and the basic issue of immigration reform. They have not embraced the issue of employer sanctions, and reluctantly seemed to indicate that it might be coming down the track. And yet, every lawyer, Democrat and Republican, on the House and Senate Judiciary Committees have known that that's the only way to get immigration reform, and that is have employer sanctions. And they were done by this very gutsy chairman of this committee, Peter Rodino, in 1972 and 1973. I happened to be practicing law in Cody, WY, at that time, but I was rather alert to the issue then, and never heard anything come up about any kind of discrimination when employer sanctions passed twice in 1972 and 1973. You might be interested in taking a look at that rollcall and who voted where on that. A pretty courageous act, and I thought I admired that, because there was someone trying to do something with illegal, undocumented immigration. And that chairman is still here and that's why Ron and I are able to proceed with our work.

I say, I always remain puzzled how the American bar stays in that position, but then I'm not puzzled when I go to the meetings and I find the same people there. There's a committee and a subcommittee, and it's just some great guys that I've come to enjoy, but there's no new blood in there. It's just the old crew. And you talk about trivialization, I've seen them smile and say, "Gosh, you know, you guys are trying there, but you really don't know what you're doing," and, "nice try," "a little misguided," "slap-dash," or "a steam-roller," or something, you know. So, Ron and I have been through the whole trivialization process on immigration reform; there isn't anything you could trivialize we ain't seen.

So, what I wanted to ask you: The H.R. 3080 attempts to limit its coverage of aliens by requiring all who file a claim with the special counsel to be citizens or intending citizens. What happens to the alien who files a declaration of intention to naturalization, applies for naturalization and then is rejected; is he or she still able to file an alienage claim then, based on his intent to naturalize?

I just thought I'd share that with my old sharpshooters on the ABA.

Mr. **Keatinge**. Senator, let me make a few more comments, if I may, before I answer the question.

First of all, let me make it clear; and I want to make this as absolutely clear as I can. And this comes from talking with our president, with the key members of our board of governors and the key policy making officers of our association: We want an immigration bill. This country needs an immigration bill. Our support for this bill is not half-hearted. We have indicated, and I indicated in answer to a question by Congressman Lungren, that as long as we have the present version of the Frank amendment in there, along with employer sanctions and legalization, we're for the bill. We're not trying to duck that, and I want to make it clear to you.

Now, do you want to repeat your specific question?

I'll try to sharpshoot it.

Senator SIMPSON. Yes; I just was saying, you know, we've got a citizen or an intending citizen, what happens to the alien who files?

Mr. KEATINGE. I say that if he drops his claim and he doesn't proceed with it, he loses the protection of the statute.

Senator SIMPSON. Oh, no, I'm saying he——

Mr. KEATINGE. I think that's the intent.

Senator SIMPSON. He applies and he is rejected. He is rejected.

Mr. KEATINGE. Then he should lose the protection, as I understand the import and the intent of this provision. If it isn't clear, clarify it.

Senator SIMPSON. Meanwhile, we may have to do that.

Mr. LUNGREN. Mr. Chairman.

Mr. MAZZOLI. Apparently that's not what it says, but——

Senator SIMPSON. No; it isn't.

Mr. KEATINGE. Well, I say, clarify it. If it's not clear, clarify it.

Senator SIMPSON. Thank you, Mr. Chairman.

Mr. LUNGREN. Could I be indulged, Mr. Chairman, for just one question of the panel?

Mr. MAZZOLI. Certainly.

Mr. LUNGREN. And it is this. The bottom line on the antidiscrimination provision, it seems to me, comes down to this: If you are an employer, and you're forced with the prospect of hiring one person for one job, you have two people similarly situated in front of you, equal in all other respects, one is a citizen, one is not a citizen, every other thing equally qualified, should we have a mechanism by which it is against the law, with which penalties are attached, for the employer to decide to hire the citizen over the noncitizen if in every other respect for the employment opportunity they are equally qualified?

Mr. GARCIA. I think you have to hire the citizen, there's no question about it. Let's make this clear, because, you know, we want to make it abundantly clear that if two people apply and one is a citizen and one is not a citizen—undocumented, that obviously you hire the citizen. I have no problem with that, none whatsoever. I don't know of anybody that would have a problem with that.

Mr. LUNGREN. Mr. Flemming.

Mr. FLEMMING. I'm troubled with the hypothetical question.

Mr. LUNGREN. I know, that's why I asked it. [Laughter.]

Mr. FLEMMING. Well, I know you did, but I think I've learned that hypothetical questions sometimes get the person trying to answer then into trouble, because I can't visualize a situation where, as far as qualifications are concerned, they're absolutely equal.

Now, I feel that the employer should have the opportunity of making a decision on the basis of the merits of the case.

Mr. LUNGREN. I understand.

Mr. **Flemming**. That is the merits of the two persons that are before him. And if he decides in favor of the citizen on the merits of the case, he clearly should not be subject to any action under this law, or under the Frank amendment, and I don't think he would be.

Mr. **Lungren**. I just know that in my job I have to hire people all the time, and I have run into the situation where, as far as I could sincerely determine, the people were equally qualified for the job. And I can see that occurring with respect to an employer in this situation and saying, "One's a citizen and one's not a citizen"——

Mr. **Garcia**. Is that person here legally?

Mr. **Lungren**. Yes; I'm talking about a person being here legally.

Mr. **Garcia**. As long as we understand.

Mr. **Berman**. Would the gentleman yield?

Mr. **Mazzoli**. The gentleman's time has expired.

I think the gentleman from California——

Mr. **Berman**. There are many different ways to put this question, to try and determine whether or not there is a logic to an alien provision. The other question that could very easily be asked is, should this bill come into being and there be a legalization program and a group of people, many of whom are already here and legal, some of whom will be newly legal, and should an employer, in the context of what we have done, be able to say, "No one will be employed by me who is not a U.S. citizen."

Mr. **Flemming**. That should not be permitted.

Mr. **Berman**. And if you don't get into an alienage cause of action, you can't reach that problem.

Mr. **Mazzoli**. I think the time has expired, but I think it does point out—and I think that Congressman Garcia has to go to make a quorum—but I think it does point out how difficult the situation is where you have that situation arising where two equally qualified people—I mean, if I understand the Frank amendment correctly, you could not prefer a U.S. citizen, you would, therefore, not be able to choose that person intentionally where you have two equally qualified people. And it does happen.

The fact is, we don't want the documented alien or the newly legalized alien to be discriminated against earning a living. But I think question was raised by the gentleman from the NAM, who felt in his sincere belief that there ought to be permitted a preference in favor of U.S. citizens who are now unemployed.

Mr. **Garcia**. I just want to clarify myself, because when Mr. Lungren spoke about the question of one or the other, I was under the impression he was speaking of somebody who was here illegally. I want to make it very clear that you cannot—let's take the example of the medical people we have working in the south Bronx today, many of them are Indian doctors. Now, you're not going to take somebody who is an American citizen, who doesn't qualify to be a doctor, to be a doctor, you'll take that legal noncitizen.

Mr. **Mazzoli**. Well, we've never been talking about the noncitizen, nonlegally here and——

Mr. **Garcia**. I mean, I'm talking about those——

Well, OK. I just want to clarify that for the record.

Mr. **Mazzoli**. People who are legally here but who are not yet citizens.

Mr. **Garcia**. Well, I think that we——

Mr. **Mazzoli**. I'm sorry, Bob, but let——

The gentleman from Texas.

Mr. **Bryant**. I just want to help you clarify, to be sure that everyone understood. You didn't say that it was your position, a moment ago, that if you have two people who are here legally that it's OK to choose the citizen over the noncitizen, that wasn't what you said?

Mr. **Garcia**. What I was talking about, Congressman Bryant, was the following: I was under the impression, that when Mr. Lungren was speaking, that he was talking about a person who was here illegally.

Mr. **Bryant**. That's what I thought.

Mr. **Garcia**. OK, so that we understand that.

Mr. **Bryant**. Yes.

Mr. **Mazzoli**. Thank you. The panel, thank you all very much for your attention and time.

Now I would like to call, with the agreement—I think the Senator was requesting that—with the Senator's permission we'll call William Bradford Reynolds, the Assistant Attorney General who has a time conflict, and was out of town, to come back.

Senator **Simpson**. Mr. Chairman, may I submit some questions for the record, for the last panel, please?

Mr. **Mazzoli**. Without objection, certainly.

Senator **Simpson**. Thank you.

[See appendix.]

Mr. **Mazzoli**. Mr. Reynolds, we appreciate your attendance today, and we know you have a time problem. Maybe it might help you to summarize your testimony as much as it might help us.

Mr. **Reynolds**. Thank you, Mr. Chairman. I do apologize for the timing problem. I'll try to stay as long as I can.

Mr. **Mazzoli**. Thank you.

Mr. **Reynolds**. Let me, if I can, just summarize briefly the testimony that I have submitted in much fuller form, and ask that that be put in the record in its entirety.

Mr. **Mazzoli**. Let me just mention, just so we have it for the record, because some of my colleagues may not be here, thinking you'd be last on the panel.

Is it your problem you have a 1:00 o'clock or 1:20, what is it?

Mr. **Reynolds**. I have a 1:30 meeting that I can probably be a little late for, but I have to be there. That's the difficulty.

Mr. **Mazzoli**. All right, well let me ask staff to call the offices of those, for example, Barney, just to be sure he knows. Thank you very much.

You may proceed.

TESTIMONY OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. REYNOLDS. Mr. Chairman, Senator Simpson, members of the committee, just briefly I'd like to make a few observations, starting with probably the most important one, which is that both immigration reform and equal and fair employment practices are important goals of this administration. Enactment of an immigration reform bill, which includes disincentives to employers for hiring unauthorized aliens, will effectively assist the effort to stem the tide of illegal immigration. That objective can best be achieved, in our view, in a manner fully faithful to the principles of nondiscrimination and equal employment opportunity, without the nondiscrimination provisions enclosed in this bill, which needlessly duplicate existing law and, if enacted, would be extremely wasteful by creating an additional, largely superfluous, enormous bureaucracy.

I have, in accordance with the committee's invitation, focussed my prepared remarks on the nondiscrimination provisions of the bill. Under its employee verification provisions, H.R. 3080 prohibits employers with four or more employees from knowingly hiring persons who are not legally eligible for employment, and requires those employers to verify that the persons they hire are legally eligible for employment. Employer verification of an individual's identity and eligibility for employment is simple and explicit. Moreover, employers who violate the act by knowingly hiring aliens not eligible for employment are subject to civil and, in some instances, criminal penalties.

H.R. 3080 would prohibit employers of four or more employees who are covered by the verification program from discriminating on the basis of national origin against any person in hiring, recruitment or referral for a fee. It would prohibit as well, with some exceptions, covered employers from discriminating against any United States citizen or intended citizen—basically aliens with lawful status who have declared an intention to become citizens—on the basis of citizenship. And the bill would create a new bureaucracy, the Office of Special Counsel in the Department of Justice, to investigate individual complaints of discrimination prohibited by this legislation, and file and prosecute administrative proceedings on suspected violations. It would also create a private right of action. If the Special Counsel does not file a case within 120 days, the individual making the charge may file a private action with an administrative law judge.

The antidiscrimination provisions were presumably included in H.R. 3080 because of the apprehension expressed by witnesses at earlier hearings that the employee verification program will result in increased national origin discrimination, particularly against Hispanics or Asians. Yet, nothing has been offered beyond mere conjecture to support the speculation that the bill's employee verification provisions will cause widespread discrimination based on national origin against Hispanics or any other group. In fact, common sense compels precisely the opposite supposition, since neither the language nor the contemplated operation of H.R. 3080 provides the slightest encouragement to employers to engage in wholesale exclusionary tactics or in any other form of discrimination.

The bill's method of verification is simple and straightforward: The documents establishing an individual's legitimate entitlement to employment are either already delineated in the bill or will be set forth by the Attorney General after the bill passes. Employers who show a good-faith attempt to verify an individual's eligibility escape liability if the individual turns out to be not eligible for employment. And the bill specifically states that an employer is not in violation by accepting a document which reasonably appears genuine, but has ultimately proven to be false.

These requirements are not onerous or complicated to follow, nor are they aimed at any particular ethnic or racial group of employees. The bill mandates verification of the identity and eligibility of all employees, and imposes penalties upon the employer for failing to follow the prescribed procedures, whether or not the individual hired is an illegal alien.

There is simply no reasoned basis to assume that employers will adhere to the bill's verification procedures for some employees, but seek to avoid them altogether for applicants of Hispanic or Asian descent by a blanket exclusion of the latter category of individuals from the work force. Such discriminatory behavior, and it would be discriminatory, exposes the employer to significant legal liability under existing antidiscrimination laws, mainly title VII of the Civil Rights Act, Section 1981 of Title 42 of the U.S. Code at the Federal level, and also a number of State and local laws that are on the books in most jurisdictions.

It is hard to believe that any business will elect to trade high risk of such liability exposure for compliance across the board with the uncomplicated, virtually risk-free verification procedures. Nor do we find any articulated basis for including in H.R. 3080 a ban on discrimination against citizens or intended citizens on the basis of citizenship. The creation of a cause of action for employment discrimination on the basis of intended citizenship is truly novel, and has been proposed without any demonstration of need to open this whole new area of enforcement responsibilities.

This brings me to one other feature of the bill's proposed antidiscrimination provisions that is cause for concern, i.e. the creation of a new, and rather elaborate, civil rights enforcement structure in a special counsel's office located in the Department of Justice. There has not yet been a showing of demonstrated need for yet another separate bureaucratic apparatus charged with duplicative responsibilities to investigate and prosecute parallel, if not overlapping, claims of employment discrimination. Congress should, in our view, at the very least defer taking action now on any discrimination provisions, and instead await the required congressional reports on the actual enforcement experience under the proposed legislation.

In sum, while the Administration strongly supports immigration reform generally, and the requirements that employers verify through simple means that the persons they hire are legally eligible for employment, we believe that the nondiscrimination provisions of H.R. 3080 are unnecessary. We are, of course, willing to work with Congress to develop an appropriate response to the apprehensions some have expressed about the possibility of employer sanctions giving rise to increased discrimination. To this end, it seems to us that there is much merit to the suggestion contained in the amendment to S. 1200 of deferring for now the adoption of a separate nondiscrimination provision so as to allow for an informed evaluation of the need for such statutory language (and the shape it might take) on the basis of our experience with the employee verification and exployer sanction features of the current bill. In light of the proposed monitoring and reporting provisions of the bill, we can more realistically determine, after enactment and a period of implementation, whether there exists a real need for some sort of non-discrimination provision.

Thank you very much, Mr. Chairman.

Mr. Mazzoli. Thank you very much, Mr. Reynolds.

[The complete statement of Mr. Reynolds follows:]

Department of Justice

STATEMENT

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW OF THE HOUSE COMMITTEE ON THE JUDICIARY AND THE SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY OF THE SENATE COMMITTEE ON THE JUDICIARY

CONCERNING

H.R. 3080, THE IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS ACT OF 1985

ON

OCTOBER 9, 1985

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to address the Subcommittee on H.R. 3080.

Both immigration reform, and equal and fair employment practices, are important goals of this Administration. Enactment of an immigration reform bill which includes disincentives to employers for hiring unauthorized aliens will effectively assist the effort to stem the tide of illegal immigration. That objective can be best achieved, in our view, in a manner fully faithful to the principles of nondiscrimination and equal employment opportunity without the nondiscrimination provisions proposed in this bill -- which needlessly duplicate existing law and, if enacted, would be extremely wasteful by creating an additional, largely superfluous enforcement bureaucracy.

In accordance with your invitation, I have focused my prepared remarks on the nondiscrimination provisions in the bill. Any discussion of these provisions, however, requires special reference at the outset to the provisions of the bill which require employers to verify that their employees are legally eligible for employment and punish those employers who refuse to do so. Let me therefore take that as my starting point.

1. Employee Verification Provisions. Under the employee verification provisions, the bill prohibits employers with four or more employees from knowingly hiring persons who are not legally eligible for employment, and requires those employers to verify that persons they hire are legally eligible for employment.

Employer verification of an individual's identity and eligibility for employment is simple and explicit. The employer may, for example, rely on an individual's United States passport for both his/her identity and eligibility, or on a foreign passport if that passport has an endorsement authorizing the person as eligible to be employed (proposed §274A(b)(1)(A)). If the individual has no passport, the employer may establish the individual's eligibility for employment by relying on a social security card, a birth certificate, or other certificate specifically designated by the Attorney General as acceptable proof of eligibility for employment (§274A(b)(1)(B)). The employer must then establish the person's identity by means of an identity card issued to aliens by the Attorney General, a driver's license or similar document containing a photograph issued by a state or local government, or any other form of documentation which the Attorney General establishes by regulation to be sufficient proof of identity (§274A(b)(1)(C)). Finally, the employers and employees must make attestations.

The bill states that an employer who complies in "good faith" with these verification requirements has not violated the bill even if the person hired turns out to be an illegal alien (§274A(a)(4)). Nor is it necessary that the employer be expert in detecting false documents; the bill states that an employer has complied with the provisions of the bill "if the document reasonably appears on its face to be genuine" (§274A(b)(1)(A)).

Employers who violate the act by knowingly hiring aliens not eligible for employment may be fined up to $5,000, and enjoined from further violations (§274A(d)(1)(A), (d)(2)). An employer found guilty of a pattern or practice of hiring unauthorized aliens may be sentenced for up to six months imprisonment (§274(d)(1)(B)). In addition, there are civil penalties of up to $1000 for each person hired in violation of the verification procedures, regardless of whether the person is an unauthorized alien (§274A(d)(3)).

I should mention that a similar immigration reform bill, S.1200, passed the Senate on September 19, 1985. That bill includes employee verification requirements similar to those in H.R. 3080. Unlike H.R. 3080, however, it appears that under S. 1200 a failure to follow the verification procedures would not, by itself violate the law. The only actions the bill describes as violations involve the hiring, recruitment, referral and continuation of employment of unauthorized aliens (§§ 274A(a)(1),(2) of S. 1200). Good faith compliance with the verification system is a defense to a charge of violating the act by hiring unauthorized aliens (§274A (a)(3) of S. 1200). However, under S. 1200, an employer may be required to use the verification system once the employer has been found in violation of the prohibition on hiring an unauthorized alien (§274A(d)(2)(C) of S. 1200).

2. Nondiscrimination Provisions. H.R. 3080 would prohibit employers of four or more employees who are covered by the verification program from discriminating on the basis of national origin against any person in hiring, recruitment, or referral for a fee (§274B(a)(1)(A)). It would prohibit

as well covered employers from discriminating against any United States citizen or "intending citizen" (basically aliens with lawful status who have declared an intention to become citizens) on the basis of citizenship (§274B(a)(1)(B), (a)(3)). Recognizing that Title VII of the 1964 Civil Rights Act already prohibits discrimination on the basis of national origin by employers of fifteen or more employees, the bill's prohibitions do not apply to any claim covered by Title VII (§274B(a)(2)(B)). Moreover its "citizenship" nondiscrimination provisions do not apply where an employer is required to hire only citizens for certain jobs by any law, regulation, or executive order, or any federal, state or local government contract, or by a determination of the Attorney General that it is essential for a specific employer to limit jobs to citizens in order to do business with a federal, state or local government agency (§274B(a)(2)(C).

The bill would create a new bureaucracy -- the office of the "Special Counsel" -- in the Department of Justice to investigate individual complaints of discrimination prohibited by this legislation, and to file and prosecute administrative proceedings on suspected violations (§274B(c)). The bill also creates a private right of action; if the Special Counsel does not file a case within 120 days of receipt of a charge, the individual making the charge may file a private action with the administrative law judge (A.L.J.) (§274B(d)(2)). After a hearing, the A.L.J. could issue cease and desist orders, retroactive hiring and back pay awards, recordkeeping requirements, and civil penalties, as well as attorneys fees (§274B(g)(2)(B) and § 274B(h)). The bill uses existing NLRB procedures for judicial enforcement of the A.L.J.'s orders or for court review of the A.L.J.'s decisions (§274B(i)).

The bill requires the President to file reports with Congress 18, 36 and 54 months after the bill is enacted. Part of the report is to analyze the adequacy of the verification system and the Act's impact on discrimination against minority citizens and permanent aliens (§402(a)(3)(A)(i)). The bill authorizes the Civil Rights Commission to monitor enforcement and to investigate allegations that enforcement has resulted in discrimination by "race or nationality" against citizens or legal aliens. The Commission is also directed to file reports on this monitoring activity with Congress 18, 36, and 54 months after the bill is enacted (§402(d)).[1]

3. Analysis. The Administration has expressed its general support for an employee verification program. We know that the extent of illegal immigration into this country is tied to the employment which historically has been made available to undocumented aliens. Undocumented workers can be easily intimidated and manipulated, and they thus are "fair game" for employers

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[1] S. 1200 does not contain any similar nondiscrimination provisions. It does provide for GAO to report on discrimination problems caused by the verification system, and requires a task force composed of the Attorney General, the Chairman of the Civil Rights Commission, and the Chairman of the EEOC to respond to such a GAO report with legislative proposals (see §402 of S.1200).

intent on exploiting the situation by hiring illegal aliens at low rates of pay and under deplorable working conditions. We agree that a requirement on employers to verify that their employees are legally entitled to work would provide a much needed disincentive to illegal immigration.

It does not follow, however, that the nondiscrimination provisions in H.R 3080 are a necessary part of the legislative package.

When an earlier immigration reform bill came before this Subcommittee in 1983, a number of witnesses testified that the employee verification program will result in increased national origin discrimination, particularly against Hispanics or Asians.[2/] These witnesses speculated that, rather than attempting to comply with the verification requirement, employers would simply refuse to hire any "alien looking" people in order to avoid altogether possible employer sanctions; that predictable attitude, it was asserted, would primarily affect Hispanics or Asians, who are most readily identifiable and categorized by appearance.

Nothing has been offered beyond mere conjecture to support, the speculation that the bill's employee verification provisions will cause widespread discrimination based on national origin against Hispanics or any other group. In fact, common sense

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2/ See *e.g.*, statements of representatives of MALDEF (1983 hearings at 888), LULAC (1983 hearings at 906), and the Organization of Chinese Americans (1983 hearings at 936).

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compels precisely the opposite supposition, since neither the language nor contemplated operation of H.R. 3080 provides the slightest encouragement to employers to engage in wholesale exclusionary tactics or in any other form of discrimination. The bill's method of verification is simple and straightforward; the documents establishing an individual's legitimate entitlement to employment are either already delineated in the bill or will be set forth by the Attorney General after the bill passes. Employers who show a good faith attempt to verify an individual's eligibility escape liability if the individual turns out to be not eligible for employment. And the bill specifically states that an employer is not in violation by accepting a document which "reasonably" appears genuine but is ultimately proven to be false.

These requirements are not onerous nor complicated to follow. Nor are they aimed at any particular ethnic or racial group of employees. The bill mandates verification of the identity and eligibility of all employees and imposes penalties on the employer for failure to follow the prescribed procedures whether or not the individual hired is an illegal alien. There is simply no reasoned basis to assume that employers will adhere to the bill's verification procedures for some employees, but seek to avoid them altogether for applicants of Hispanic or Asian descent by a blanket exclusion of the latter category of individuals from the workforce. Such discriminatory behavior -- and it would be discriminatory -- exposes the employer to significant legal liability under existing anti-discrimination laws, namely: Title VII of the Civil Rights Act of 1964 (which condemns employment discrimination on account of race, color or national origin in firms of 15 or more employees) and Section 1981 of Title 42 of the U.S. Code (which reaches such discrimination in smaller firms and businesses)[3] at the Federal level, as well as similar state and local laws that are on the books in most jurisdictions. It is hard to believe that any business will elect to trade the high risk of such liability exposure for compliance across the board with the uncomplicated, virtually risk-free verification procedures. And that was indeed the conclusion of the 1981 staff report of the Select Commission on Immigration and Refugee Policy, which found that a simple method of employee verification would not be likely to encourage discrimination against workers based on national origin or alienage.

Nor do we find any articulated basis for including in H.R. 3080 a ban on discrimination against citizens or "intending citizens" on the basis of citizenship. The creation of a cause of action for employment discrimination on the basis of intended citizenship is truly novel, and has been proposed without any demonstration of a need to open this whole new area of enforcement responsibility. To the contrary, it is offered against the backdrop of a specific refusal by Congress when it enacted Title VII in 1964 to prohibit discrimination based on citizenship or alienage, and the decision in Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88-91 (1979), some 15 years later, where the Supreme Court declined to extend Title VII to an employer who refused to hire non-citizens, there being no proof that the policy actually was used to limit employment of Hispanics or any other specific group.

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[3] Section 1981 grants all persons a right to contract equal to that of "white persons." To the extent that discrimination based on national origin denies individuals of Hispanic or Asian descent a right of employment that the employer grants to whites, courts have held that such discrimination is prohibited by Section 1981. *See e.g.*, *Gonzalez* v. *Stanford Applied Engineering*, 597 F.2d 1298 (9th Cir. 1979); *Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979).

H.R. 3080 itself recognizes that citizenship discrimination is not always to be condemned and may well serve a perfectly acceptable basis for differentiating among applicants for employment in some circumstances.[4] It therefore would seem that considerably more study needs to be undertaken before Congress is in a position to make an informed decision regarding enactment of new legislation prohibiting discrimination on account of citizenship. As the staff report of the Senate Judiciary Committee observed this past June following an examination of this very issue, there currently is no convincing basis for adding "alienage" or "citizenship" provisions to the immigration reform package.

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[4] See, e.g. Espinoza, supra (discussion of federal positions limited to citizens); Foley v. Connelie, 435 U.S. 291 (1978) (allowing a state to limit certain positions to citizens); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982) and Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984) (discussing the effect of some treaties on the right of foreign-based companies to limit certain positions to their own citizens).

This brings me to one other feature of the bill's proposed anti-discrimination provision that is cause for concern, i.e., the creation of a new, and rather elaborate, civil rights enforcement structure in the Special Counsel's office located in the Department of Justice. Under Title VII, there are presently two separate federal entities which prosecute claims of employment discrimination -- the EEOC and the Civil Rights Division of the Justice Department. The Labor Department enforces nondiscrimination requirements imposed on federal contractors by Executive Order 11246. Many state and local governments have created their own enforcement agencies. And, individuals with employment discrimination claims may take them to court if they are dissatisfied with the results of these enforcement mechanisms. One thing that clearly is not needed is yet another separate bureaucratic apparatus charged with largely duplicative responsibilty to investigate and prosecute parallel, if not overlapping, claims of employment discrimination. This is particularly so in light of the provisions in H.R. 3080 calling upon the President and the Civil Rights Commission to report to Congress in eighteen-month intervals following the bill's enactment. These reports are to contain, inter alia, a discussion on the effect of the bill's operation on discrimination against any minority groups (see §402(a)(b)). Congress should, in our view, at the very least defer taking action now on any discrimination provisions and instead await the congressional reports on our actual enforcement experience under the proposed legislation. We can then be in a much better position to assess meaningfully whether the nondiscrimination sections and additional enforcement mechanisms are really necessary.

In sum, while the Administration strongly supports immigration reform generally, and the requirement that employers verify, through simple means, that the persons they hire are legally eligible for employment, we believe that the nondiscrimination provisions of H.R. 3080 are unnecessary. We are, of course, willing to work with Congress to develop an appropriate response to the apprehensions some have expressed about the possibility of employer sanctions giving rise to increased discrimination. To this end, it seems to us that there is much merit to the suggestion contained in S. 1200 of deferring for now the adoption of a separate nondiscrimination provision so as to allow for an informed evaluation of the need for such statutory language (and the shape it might take) on the basis of our experience with the employee-verification and employer-sanctions features of the current bill. In light of the proposed monitoring and reporting provisions of the bill, we can more realistically determine after enactment and a period of implementation whether there exists a real need for some sort of nondiscrimination provision.

Mr. MAZZOLI. I will yield myself five minutes to start out, and thank you very much.

You hadn't the opportunity of being in the room this morning, or I think you would have seen the problems we faced, on the one hand, with this kind of uncomfortable feeling about a newly-legalized individual, a person who has been here legally and qualifies for legalization, or some permanent resident alien who is qualified to work, is entitled to work under the laws of our land, being somehow prevented from working because an individual, an employer, a company has a "citizens only" hiring policy, not because of national security or because of some of the other exceptions, but simply because in patriotism that individual wants to hire those people. We seem to find most panelists feeling slightly uncomfortable with that, but not really being able to put their finger on exactly how to handle it, feeling that, for example, the Frank amendment goes so far and sets up separate bureaucracies and is a leap into the dark, perhaps on grounds—and without the proper documentation of existing discrimination. On the other hand, title VII as acted upon by the EEOC only applies to fairly large employers, not to smaller ones, and this would be that proverbial crack through which a lot of people would fall.

I wonder if maybe you might just kind of help us, perhaps even philosophically. Do you as an individual, and perhaps the Justice Department as a group, suggest that it is appropriate for an employer to have a policy to say,

> We only want to hire U.S. citizens; we're not against you because you're black, or because you're brown, or because you come from Afghanistan or Mali or wherever, but we just want to hire U.S. people. There's a lot of unemployment, and we want to give preference on jobs to U.S. people. So you're standing before me, you're a permanent resident alien, legally in this Nation, legally able to work, but I want to give the job to the guy standing next to you.

I wonder, how do you react to that?

Mr. REYNOLDS. Well, I think that philosophically—I think there certainly is something to be said for an employer, and I think there is nothing that is wrong with an employer having that view in terms of his employment determinations. It seems to me that we have protections that are well-built into the law, which do not allow for those kinds of sentiments to serve as a pretext for discrimination on a national origin basis. I think that those protections are ones that provide an ample opportunity to prevent the kind of situation that seems to be at the heart of most of the concern that has been registered about this immigration bill.

Mr. MAZZOLI. So, so long as it is not a pretext or some sort of hidden agenda, you don't see any problem with the situation of an intentional, clear-cut, objectively applied policy to hire U.S. citizens.

Mr. REYNOLDS. No, I think that Congressman Lungren's example was a very telling one. I think that it very poignantly posed the issue that is before the House on this bill. I think that in those situations where you have two equally qualified individuals, one who is a citizen, the other who is a noncitizen but fits under the category that you described, that it is certainly permissible for the employer to say that he would prefer to choose a citizen.

It is no answer to say—"That hypothetical is really not one that I think we would ever confront, because you're never going to get two equally qualified people; and since you have that, we don't need to worry about the discrimination provision." If they're not equally qualified, we're not worried about discrimination; I mean in all other respects. Then you're saying there is one that clearly is better than the other, and we'll pick him for reasons that are better than the other, and it's nondiscrimination. So, the example is really exactly the right example or hypothetical that, it seems to me, one should focus on, and the question is whether, by putting this provision into the bill, you really do weight the selection process over in favor of the noncitizen, and basically require that, in that hypothetical, the employer pick the noncitizen. I think——

Mr. Mazzoli. Are you saying, Mr. Reynolds—my last question, because my time is about to expire—are you satisfied that there is no employment discrimination based on alienage at work in the country? Are you satisfied, contrarily, that there is not that kind of discrimination?

Mr. Reynolds. I think I'm probably where everybody else is who has been before this Committee and who has spoken on this whole question, as near as I can determine. I don't think anyone has the answer to that, and I think that, probably, one of the things these hearings point out more than anything else is that if Congress is going to undertake to craft that kind of a provision in legislation, it should be on the most informed basis that it can do it. There is no doubt in anybody's mind that it is embarking down a new road and it is going into new areas.

There is also, I think, a pretty clear recognition on the part of everybody that we don't know—we do know that we have laws that say—we don't know about your question on alienage discrimination. We do know that we have a protection against national origin, and it would seem, for the most part, that the national origin protections would guard against precisely the kind of concerns that have been raised. But I think that the responsible way to deal with those concerns, and with the kind of debates that have been engaged in here, and back and forth, is very much what the Senate has done regarding its—I don't want to call it a sunset provision—but the provision that says we will monitor this activity for a period of years, the GAO will do reports, and if we find a pattern and practice of discrimination, then we treat with it; then we know, for example, whether it's relevant that you cut off 15, or 3, or 10, or 20, or 5, because you will have an informed body of knowledge to give you some frame of reference to legislate in this area.

Mr. Mazzoli. Mr. Reynolds, my time has expired.

Do you think there will be any advantage if we were to accept part of the Frank formulation, which is to apply title VII, with its national origin discrimination, down to four employers—that ban not now covered by the existing law—and withhold the application of the rest of it, which is the alienage discrimination, pending some study or something of that nature. I think there is clear evidence that currently there is a band of employers, those who hire 4 but fewer than 15, who are exempt from the application of title VII, with its national origin, or sex or other discriminatory features.

And there is some discussion that that may not be the way it ought to be, how do you see that?

Mr. **Reynolds**. I think that with regard to that category, and it is one that certainly is a loophole under title VII, section 1981 provides ample protection for this kind of problem for the smaller employers——

Mr. **Mazzoli**. So you don't think that that will be needed to change title VII.

Mr. **Reynolds**. Well——

Mr. **Mazzoli**. OK. I'm just asking the question, so if you don't——

Mr. **Reynolds**. Well, if I could, because I think it's one that at least we ought to try to come to grips with.

I think that the problem with saying that we simply ratchet down, if you will, for national origin, the 15 to the 3, in the existing piece of legislation, is that it has the driving force of basically coming to the same conclusion with respect to all the other forms of discrimination covered by title VII, because you otherwise have to come up with some logical expressions as to why you are going to give that treatment in one area of title VII, and not in the others. And I think that is probably not the best way for Congress to go about amending title VII. My sense is that this is a discrete problem the Congress has to come to grips with. It is a problem where, I think, everybody recognizes we're shooting in the dark in many respects, if not in all respects. Nobody has the answers, and there is a lot of speculation. The most informed way to treat with this problem in a responsible way is, it seems to me, very much to follow the amendment that has been offered in the Senate, where indeed we can get the information, and then deal with a nondiscrimination provision in whatever form it should take with that empirical body of information before us.

Mr. **Mazzoli**. I thank the gentleman. My time has long since expired.

I yield to the gentleman from Wyoming sufficient time I'll make up for, since I used up more time.

Senator **Simpson**. I don't want to be repetitive. I just want to check that again.

We are aware that title VII does not include alienage as one of the prohibited forms of employment discrimination. Yet I think it's a widely held belief of those that work in the area, scholars, lawyers, that there is significant coverage, and it's been testified here, significant coverage of alienage discrimination under present law. So, I may be a bit repetitive, but could you tell us briefly the extent of, as you see it, the current coverage of alienage discrimination?

Mr. **Reynolds**. I think that as you just expressed, it is right. The current coverage of alienage discrimination is very much parallel to the current coverage of national origin discrimination. There are very few cases that anybody has found, and there has been a thorough search of it that will differentiate between the two. The *Espinoza* case is the one that everybody cites, but it's really an example out there unto itself.

If indeed you have coverage in national origin, it seems to me that those protections will fully cover whatever concerns one has with regard to the discrete problems of alienage, and that is a full protection. I only say that to the extent that experience under this bill might suggest that it is otherwise; we ought to move forward with that knowledge, not by reason of some speculation or some conjecture as to what might, indeed, develop.

Senator SIMPSON. Just one other question. The antidiscrimination proposal in H.R. 3080 and the Frank amendment which preceded it are all based, really, on the enforcement model of the National Labor Relations Board. That's where it came from. Barney said he didn't know where it came from; I still don't know where it came from, I'm like Barney. But it sure came from somebody who had been trying a long, long time to mess with the NLRB and never got it passed around here. And so they thought, as the train went through at 2 o'clock in the morning, that they'd try that one more time, because they'd been bashed in 1964, they've been bashed in 1972, and suddenly they come along to haunt Mazzoli and I with it.

But anyway, it all came out of the ghost of NLRB past, and we have a special counsel's office, potential plans with significant new procedural and remedial authority which even the NLRB does not have, ironically enough, that would seem to me, at least, to absolutely encourage litigation.

Could you describe some of that additional authority that you see there, please?

Mr. REYNOLDS. Well, I think you're absolutely right. It would encourage additional litigation. Indeed, I think that the NLRB probably served as a starting point, for what we see in this legislation is not accurately described as a model. There are, for example, with regard to this particular provision, you can investigate—an investigation can be initiated only upon the filing of a complaint by the complainant and the special counsel's office on his own can conduct investigations as he sees fit, whereas the general counsel of the NLRB does not have authority to initiate his own investigations. Under the NLRA, there is no private right of access——

Senator SIMPSON. That's a rather extraordinary thing there, isn't it?

Mr. REYNOLDS. It will expand tremendously the kind of litigation we are talking about. The NLRA doesn't have a private right of action; we're talking here about a private right of action that will allow you to bypass the special counsel and lodge discrimination charges directly with an administrative law judge under H.R. 3080, and that's a tremendous expansion. H.R. 3080 accords the complainant direct review to the U.S. District Court, and there are intermediate appellate reviews, which means we are probably going to overload the Federal court system without, indeed, taking any of that load off at the administrative level.

In addition, under H.R. 3080, we have administrative law judges who can impose civil penalties against the offending employer, which is unlike anything that they have in the unfair labor practice, and I think it's also the case that there is no provision for attorney's fee awards under the NLRA, and you have them here. So, there are striking differences, and to call it a model, it seems to me, is not quite as accurate as it might be; it's more a starting-off point, or a jumping-off point, and what has been added into this procedure is something that really greatly or vastly expands the whole litigation effort, and encourages it to be expanded.

Senator **Simpson**. Thank you very much.

Mr. **Mazzoli**. The gentleman's time has expired.

The gentleman from California is recognized for 5 minutes.

Mr. **Berman**. Thank you, Mr. Chairman. I'd like to develop that a little more, because my own feeling about the answer to your last question is that you paint a picture of this a little differently than I see it, and I'd like to develop that with you a little more.

Under the Civil Rights Act of 1964, title VII, there is a private right of action, isn't there?

Mr. **Reynolds**. That's right.

Mr. **Berman**. So when you say that under this procedure it has a private right of action and the National Labor Relations Board doesn't, the Civil Rights Act of 1964 does.

Mr. **Reynolds**. Well, the Civil Rights Act of 1964 right of action in most cases is one that's tied to a filing of a complaint with the EEOC, in the first instance, and it goes through that process within the EEOC.

Mr. **Berman**. Then I'm under a very mistaken impression. I assumed the Frank amendment required the filing of a complaint with the special counsel before they could———

Mr. **Reynolds**. That's right.

Mr. **Berman**. And pursuing it for 120 days before they could provide———

Mr. **Reynolds**. Lodging it with them for 120, but there is a trial run———

Mr. **Berman** [continuing]. Which is just what goes on in the EEOC, is that right?

Mr. **Reynolds**. That's correct.

Mr. **Berman**. That pretty much tracks the procedure in the Civil Rights Act.

Mr. **Reynolds**. Right. So I would say if you want to, you can say it is duplicative, that is, we have a duplicative procedure here.

Mr. **Berman**. Now what we have here is a hybrid thing that has some of the features of the National Labor Relations Act, some of the features of the EEOC Civil Rights Act.

Mr. **Reynolds**. I think that's correct.

Mr. **Berman**. In and of itself I think that's not inherently bad, is it?

Mr. **Reynolds**. Well, I was simply commenting on whether it's accurate to say it's modeled on the NLRA. I'm not suggesting any of it is inherently bad, I think the problem we have is that by crafting now a rather elaborate new mechanism for enforcement that is duplicative and, in some ways, inconsistent with other schemes that are out there, it seems to me that you lose an awful lot of the advantages of the body of law that has grown up under title VII and in EEOC practice, and you interject a whole new system that can well be—I won't call it bad, but counterproductive, in terms of trying to figure out all these claims in the final analysis, especially if it is a case—that national origin and alienage are in respect virtually the same thing.

Mr. **Berman**. If national origin and alienage are the same thing, then the only benefits you have from the Frank procedure are, one, covering a broader range of employers, and two, getting past the tremendous procedural difficulties that render the Civil Rights Act of 1964 title VII to be a very difficult procedure to get any kind of timely action. And I speak as one who represented clients in such cases in the late 1960's and early 1970's, and I'm not aware of any amendments of significance that have changed that dramatically, and there are significant defects.

So you could say, "Why don't we amend title VII?" And the answer is, "Because, for tactical reasons, the people who would most prefer to do that are fearful of what else might come under that."

But now, on the issue of alienage and national origin—do you think it is right—let's try and deal with the moral question here—is it right for the employer to pass over a more qualified legal resident alien in order to hire a citizen, in order to comply with his own self-imposed policy that he is going to give preference to citizens—or he's not going to hire legal resident aliens. Is there anything——

Mr. **Reynolds**. No; I think that would be discriminatory on the basis of national origin, and covered by the existing laws.

Mr. **Berman**. Why would it be discriminatory based on national origin? He's passing over legal resident aliens to hire U.S. citizens, they could have originated in the same country. But a naturalized citizen, I don't see why—if that's your notion of the same, then I don't understand——

Mr. **Reynolds**. OK, I misunderstood your question.

Well, I think that's the employer's decision by the way that you posed the question.

Mr. **Berman**. There's no—that doesn't rise to the dignity of a—it's a right or it's a wrong, in your mind.

Mr. **Reynolds**. It doesn't make too much good business sense to me, but if an employer wants to hire somebody less qualified, and it isn't based on race or sex or color or national origin or religion, then it seems to me that the employer can do that.

Mr. **Berman**. What was the good business sense of not hiring blacks and not hiring women, and not hiring Jews?

Mr. **Reynolds**. Well, I said you can't—that's exactly the point I made. That there are laws on the books that preclude you from passing people over who are more qualified because of those kinds of characteristics.

Mr. **Berman**. We're talking about shouldn't—is this worthy of being treated, in the context of employer sanctions at the equal level of proscription?

Mr. **Reynolds**. And again, I think that my answer is that it largely depends on whether national origin and alienage are sufficiently separable that you can say that there is not sufficient protection under the existing law. And I don't think any of us have the divine answer on that. I think that is clear no matter who has come up here and testified, and that is why I would suggest that if Congress is going to embark on that course, that it should do it on the most informed basis it can by using the kind of provision that has been suggested to be added to the Senate bill, where you get some empirical data on whether or not the problem you're concerned with is a real problem, or is a phony problem. And I don't really know what the answer to that is.

Mr. **Mazzoli**. The gentleman's time has expired.

The gentleman from Texas is recognized for 5 minutes.

Mr. **Bryant**. Thank you.

Mr. Reynolds, last week we had before this committee the administration spokesman from the Department of Agriculture, Mr. Norton, with regard to the guest worker issue. And at that time, the administration position was that we should vastly expand the guest worker provision and allow a minimum of 350,000 or more illegal—I should say alien, non-citizen people to come into the country to do farm work. I asked for evidence of the need for that. Specifically, I asked him, did he know of the percentage of farm workers who are aliens at the present time, did he know the percentage of American farm workers who are unemployed, and a series of other questions. He didn't have the answers to any of those.

Then I asked, "Well, then, what is it you're bringing to this committee? What evidence do you have that shows that we should expand the guest worker program?" And I think the record will reflect that he brought no evidence forward whatsoever, and didn't really have much of a response to my questions.

My question to you is that today, you come to us and tell us that you don't see any evidence of discrimination out there or the possibility of discrimination out there if we pass this bill without the Frank amendment. My question is, why is the administration so ready to take a running leap in the dark, I think to use some of your own words, with foreign guest worker programs, and yet so insistent on detailed, concrete, specific evidence when it comes down to protections against discrimination in the workplace?

Mr. **Reynolds**. Well, I obviously can't speak to the first half of that, but it seems to me that we are—what we are saying here is that there is a body of law on the books that protects against discrimination, and I think that there is a general sense that it would be more than ample to treat with the concern that has been registered by those who feel that there might be discrimination as a result of this bill.

The other part of it is that you have, I think, very carefully and commendably structured an employee verification program that, far from encouraging the employer to ignore it, discourages any kind of activity on the employer in the sense of saying that he is going to skip the verification program or not do it. The bill has been, I think, very commendably structured with the kind of verification program that really does encourage the employers to adhere to it. And with the kind of sanction provisions that are in there, and by reason of the fact that it is against a backdrop of existing antidiscrimination provisions that are, I think, more than ample to treat with the problems that might arise, the administration feels it would be wrong to put into place, on conjecture alone, a whole new apparatus that deals with nondiscrimination that is duplicative, and in some respects inconsistent, and in some respects terribly ambiguous, in this particular area.

Mr. **Bryant**. Well I think that probably reiterates, or causes me to want to reiterate, the reason for my question, and that is that you are quite anxious to—your administration is—to advocate that we expand the guest worker program without evidence, yet you come in here and argue that we should not pass the Frank amendment because you don't see sufficient evidence of the need for it. And that's a rhetorical question. I think it's a problem with the administration's position.

Now, is it your understanding that the administration supports the notion of amnesty?

Mr. REYNOLDS. In—I think that's already been—we've spoken of that—I mean there has been testimony on our view on that.

Mr. BRYANT. My recollection was that the Attorney General said that you did support amnesty.

Mr. REYNOLDS. I mean generally, yes, there are—if you're talking about who and the timing and that sort of thing——

Mr. BRYANT. Well the provision in this bill——

Mr. REYNOLDS [continuing]. Discussions on when——

Mr. BRYANT [continuing]. My recollection was he said that——

Mr. REYNOLDS. I think the general answer is that we don't have a problem with that, once there is agreement on timing and who is involved.

Mr. BRYANT. Well, the answer from the Attorney General was that he supported amnesty, as I recall, and that he might have some problems with the date of 1982——

Mr. REYNOLDS. Well, that's what I was trying to—that's what I was saying, that I think that the general concept is one that we don't have a problem with. It's the timing that is a question.

Mr. BRYANT. If so, then, we would have under the law that we passed a group of people in the United States who are not citizens nor are here illegally by virtue of an act of Congress advocated by the administration, as well as a number of Members of Congress. Under those circumstances, I think it's clear that the existing law would permit an employer to hire European noncitizens who are legally present here, but refuse to hire Latin American noncitizens who are present here, particularly those employers who had 15 or fewer employees.

Now, does the administration countenance that situation existing?

Mr. REYNOLDS. I think it's just the opposite. I think that the existing law, if anything, would be something that would say that they would not countenance the refusal to hire Hispanics or Latin Americans, but might indeed cause some problems with regard to Europeans, because its provisions are ones that are geared to contracting in the same way as you contract with whites. And in terms of the problem that we're dealing with here, it's one that very directly impacts on that group of aliens who fall into the categories, as the cases have recognized. It would say section 1981 provides that protection. So I think it's just the opposite——

Mr. BRYANT. I think you are not, hearing my statement correctly, or answering something other than what I asked. The previous legal expert here talked about what the current state of the law is, agreed with the memo, I think, prepared by the subcommittee staff with regard to current law which indicates to me, if you read it, that noncitizens who are present in this country but are present here legally can be discriminated against on the basis of national

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origin at the present time. There is not any way to prevent me from running an ad in the paper saying, "I'd like to hire some European people who are aliens but who are here legally, but I don't want to hire anybody from Latin America."

And my question to you is——

Mr. **Reynolds**. I don't think the law would allow you to do the "but I don't want to hire anybody from Latin America." That's my point.

Mr. **Bryant**. My question to you is, Where do you disagree with the interpretation?

Mr. **Reynolds**. That's where I disagree, because I think that——

Mr. **Bryant**. Well, which law prohibits—which law protects them?

Mr. **Reynolds**. Section 1981 is a clear protection, under 15 and title VII for over 15, as well as section 1981.

Mr. **Bryant**. Mr. Chairman, just 30 more seconds.

I would just point out to you that it is quite clear that we have, at least in two circuits, a conflict on that issue at the present time in the law that is not—that indicates that there is not a protection available to those people. And if the Congress adopted the administration's position, we would have a situation where an employer could legally discriminate between noncitizen alien workers in this country based upon national origin.

Mr. **Reynolds**. Again, I stated what I think the law is. Section 1981 would, it seems to me, provide the kind of protections you are concerned about for the smaller businesses under 15, with respect to the group of aliens that we are focused on and have concerns with regarding this kind of legislation.

Mr. **Mazzoli**. The gentleman's time has expired.

Mr. Reynolds, thank you very much. You may excuse yourself, and if there are further questions, we'll send them to you and ask for written comments.

Mr. **Reynolds**. Thank you, Mr. Chairman. I'm sorry that I had such——

Mr. **Mazzoli**. Well, we appreciate your coming.

The next panel is Mr. Paul Grossman.

Mr. Grossman, welcome. Your statement will be made part of the record.

I want to comment, at least, that the staff advises me that your statement was late by some 8 hours. Now, that was not an impediment to our preparing for this testimony, but I intend, to the extent that I'm permitted by my colleagues in the subcommittee, to rigidly enforce that 48-hour rule. But you're welcome and we appreciate your testimony, and we'll hear from you now.

Senator **Simpson**. We're not like that over there. [Laughter.]

Mr. **Grossman**. It was mailed from Los Angeles October 2. I'm sorry it took so long.

Mr. **Mazzoli**. Was it, really? I'll have to get the USPS in there, then, unless you sent it Pony Express. We heard our friend talking about the Pony Express in here today.

TESTIMONY OF PAUL GROSSMAN, ESQ.

Mr. GROSSMAN. I think it important that I begin by letting you know why I am here and who I represent. I am here because your staff asked me to come. I represent no one, I'm here at my own expense. No one is paying me to be here.

My background is that I coauthored the major book in the field of employment discrimination law. I teach employment discrimination law to lawyers, both plaintiffs and defense lawyers. I have an active practice of labor law, which has gone on for 21 years. I represent employers in labor law. However, I also spent 10 years on the Board of the Legal Aid Society of Los Angeles, and as its president, where we represented tens of thousands of individuals who have the sorts of problems that you're discussing here today.

I advocate nothing, other than my own views, as to what would make sensible law. I have no constituency. I think there is one point above all that I wish to make, based on my history of recognizing the problems of individuals, the problems of employers, and what makes good law. That is, assuming—and this is an assumption that I don't share—but assuming that this bill would create substantial alienage, as opposed to national origin, discrimination, and that a prohibition in Federal law against alienage discrimination is desirable and necessary, it is insanity to create a separate Federal agency. You should amend title VII.

Why? Let's go through the parade of horrors that would exist for both charging parties and employers with separate agencies. Let's assume that I am an Hispanic, an intending citizen, and I am turned down for employment by a big employer—more than 15 employees. I don't know whether it's citizenship or national origin.

I go to my lawyer: "What do I do?"

Well, a smart lawyer would say, "I don't know if it's citizenship or national origin, either. Why don't you go file a national origin complaint with the EEOC, and why don't we file an alienage complaint with the Justice Department?"

I go down there. I do that. I want to vigorously prosecute my rights. I do so under both statutes.

The EEOC has to investigate and make a reasonable cause determination. That's a statutory obligation of theirs, they cannot delegate it. Staff people of the Federal Government will conduct that investigation, they will take my time as the charging party's time. They will take the employer's time. At the same time, the special counsel has to investigate. My time will be separately required, telling my story to that person.

The employer has the corresponding, duplicative burden, under your scheme. There will be investigators from the EEOC who will go out, there will be a factfinding conference at the EEOC, there will be investigators from the special counsel's office.

No matter what happens before either agency, if the EEOC says, "You're right, you were discriminated against because of national origin," they usually don't sue. They usually let me sue. But they might sue.

Then I'm in Federal court. I'm in Federal court either with my own attorney or with the EEOC. The employer is also in Federal court. We're going through depositions, we're going through interrogatories, we're litigating the case in Federal district court, because that's the only remedy under title VII alleging national origin discrimination.

At the same time, I am filing a complaint, or the special counsel is filing a complaint, alleging citizenship discrimination before the Justice Department. We are before an administrative law judge. I can do this on my own, as the individual, or the special counsel can do it.

At the same time, we are in Federal court litigating a Federal district court lawsuit with full discovery procedures, motions, depositions, and the like, and we're litigating a procedure before the administrative law judge. Then, I'm going to get a final ruling from the Federal district court, and I'm going to get a final ruling from the administrative law judge. I'm going to take the administrative law judge's decision to the courts, because that's where they end up, and we're going to have these duplicate procedures all the way up.

That's preposterous. That is preposterous from the charging party's point of view, that is preposterous from the employer's point of view, that is preposterous from the taxpayer's point of view, that is preposterous from any view anyone ever held of good government.

Let's take the other side of the coin. Let's say we don't know whether the employer has 15 or more employees. That's not so clear, because at the given point in time, if it's a seasonal business the employer may have 100 employees. So the charging party, the legal aid society or his attorney or anyone else, doesn't know: Is this a title VII situation for national origin, or is this Justice? Do you go to one or do you go to the other?

You cannot know until you get into the lawsuit and take discovery, whether the employer had 15 or more employees for 20 weeks of the preceding calendar year. So a good lawyer would want to file the national origin complaint with both Justice and the EEOC. They would want to proceed in both places on the national origin complaint, and with the Justice Department on the alienage complaint, compounding one more time the example I've already given you. That's preposterous. That is absolutely ridiculous.

Now you couple that with the fact that you are going to have entirely separate agencies going along, you're going to have to hire investigators, you're going to have to train investigators. The EEOC has had 20 years of that. They haven't done a very good job, conceded. There are many, many weaknesses of the EEOC, conceded. They should have done a much better job. The Federal courts have done a pretty good job under title VII. And the saving grace of title VII has been that any individual who is befuddled by the incompetence of the EEOC can, with a competent attorney, go to Federal court and sue, and get a fair hearing and get a fair determination if they can get legal representation, and attorney's fees are provided. And that has been why title VII has worked.

But, to require a new agency to gear up to do everything the EEOC has done, to create those hundreds of forms, those thousands of rules, to open offices, to train staff, and the like, you're going to go through the same chaos that the EEOC went through in its early formative years, which resulted in a 100,000-charge backlog. It's just crazy, to do it all over again through a separate agency.

What's the justification that one can possibly offer for this? Well, the EEOC hasn't done a very good job. I've heard a lot of debate about how important alienage discrimination is. If you have equally qualified people, should an employer be able to prefer a U.S. citizen? I can see both sides of that. You want my personal view? No; I find it personally repugnant denying somebody a job on any criteria that doesn't relate to their ability to do the job. Can I see the other side of the issue? Yes; I can see a patriotic American saying, "buy American, hire American." It's not my view, but it might be somebody else's view.

Alienage discrimination, the point is, is somewhat more debatable. You can't debate race discrimination, that's evil. You can't debate sex discrimination, that's evil. No one would argue against that. And you're going to leave race and sex at the EEOC, which you don't like; but alienage, which is debatable, is so much more important that you have to create a special Federal agency for it, while you're not creating a special federal agency for race, or for sex, or for age, or for religion?

That's preposterous, that's nonsense. What am I hearing from my elected representatives? Alienage, which is debatable as to whether you should be able to do it or not, is so important that we can't leave it at this incompetent EEOC and we've got to create a special Federal agency? But we're not going to do that for race? We're not going to do that for sex? We're not going to do that for age, or religion? That's preposterous.

The bottom line is, if you think alienage discrimination should be prohibited—and I don't like it, it's morally objectionable to me—if you think that the existing law wouldn't provide a remedy, if you think there is a distinction in the real world between national origin and alienage discrimination—which, incidentally, there is not, but you can debate that—then you should amend title VII to prohibit alienage discrimination. Very, very easily, the conclusion of my paper tells you exactly what sections have to be amended.

What are the objections to that? Well, I've been here all day, I've listened all day. Objection number one: title VII doesn't cover employers with between 4 and 14 employees.

Well, I don't think employers with between 4 and 14 employees are the crux of the problem, but if you think they are, fine. You have two solutions, each of them far superior to creating a whole separate Federal agency. First, you create a special definition of a covered employer under title VII and you say:

> With respect to national origin and alienage discrimination only, an employer shall be deemed covered if they have 4 to 14 employees.

That is a whole lot less disruptive than creating a whole new bureaucracy in the Justice Department.

Alternatively, please remember—there's no magic to 15—when title VII was passed, it started at a hundred employees. Just add a definition to title VII that says:

> With respect to employers engaged predominantly in agriculture, they shall also be covered if they have more than 100 employees for five or more weeks,

or something like that. Very simple, if the coverage issue is the problem, the answer is don't create a special Federal agency, just make a minor tinker with the definition of employer under title VII.

Putting on my charging party hat, I am appalled at the 3080's provision prohibiting discrimination only with respect to hiring. Title VII prohibits all discrimination. If alienage discrimination is evil, it's evil. There should be no provision whatsoever limiting it to hiring discrimination. Your bill limits it to hiring discrimination. I think it's appalling. It wouldn't happen in the real world, but I think conceptually it's appalling that an employer has an obligation to hire intending citizens but has no obligation whatsoever not to discriminate against them after that. Under your bill, you can fire them the day after you hire them. That's not prohibited. Maybe somebody would deem that a technical refusal to hire. But you can pay them less. You can say, OK, Mr. Alien, I'm gonna hire you, the bill says I've gotta hire you, but you get the scut work, the citizens get the good work. I assign scut work to the aliens and good work to the citizens—perfectly okay under your bill; would not be OK under title VII if you amended title VII.

That's ridiculous. Nobody thought about this thing.

You can pay them differently. OK, Mr. Intending Citizen, I'm going to hire you. I've got to hire you. But I'm going to pay you the Federal minimum wage; everybody else gets eight bucks an hour. That's OK under your bill. Ridiculous. If you don't try to create a whole new employment law structure, if you think alienage discrimination important, and that there is a lot of it, or that this bill will create it, amend title VII. Keep the basic structure of Federal law. Don't try to do it all over again.

And I haven't even mentioned the two decades of law we have interpreting title VII, which have finally let us know what the rules are. My book on title VII, which I should have brought, is that high. You don't want to start over again.

Mr. **Mazzoli**. Thank you.

[The statement of Mr. Grossman follows:]

TESTIMONY OF PAUL GROSSMAN*

I

MY TESTIMONY IS LIMITED TO THE EMPLOYMENT DISCRIMINATION FEATURES OF H.R. 3080

I have been asked to testify only with respect to the discrimination provisions of H.R. 3080. I do not purport to have any expertise outside the discrimination field that would relate to this bill.

II

IF AN ANTIDISCRIMINATION PROVISION IS NECESSARY, IT WOULD BE FAR PREFERABLE TO AMEND TITLE VII RATHER THAN TO CREATE AN ENTIRELY NEW STATUTORY SCHEME

A. Thousands of Court Decisions Over 20 Years Have Clarified and Refined the Substantive and Procedural Issues that Arose Under Title VII; a New Statutory Scheme Would Have to Duplicate This Torturous Procedural History.

1. "The procedural scheme detailed in [Title VII] . . . was an exceedingly fruitful source of procedural litigation." Schlei & Grossman, Employment Discrimination Law (2d ed.) at p. 1013.

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* Co-author, Schlei & Grossman, Employment Discrimination Law
Partner, Paul, Hastings, Janofsky & Walker

2. The end result of most procedural litigation was to simplify the scheme so that substantive rights were not lost. "[T]he courts were generally unreceptive to the numerous procedural defenses asserted to Title VII actions. The prevailing judicial attitude . . . seems to have been that the congressional promise of federal protection against invidious employment discrimination, ultimately secured only by the opportunity for the aggrieved to litigate in the courts, should not be rendered meaningless by the complexity of the statutory scheme in which it was embodied. Accordingly, most procecural defenses . . . were rejected by the courts, and the seemingly intricate procedural requirements set forth in the statute were rendered relatively simple in practice. . . ." Id. at pp. 1013-14 (Emphasis added).

3. Examples of cases simplifying and clarifying procedural requirements.

   a. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) (Title VII time limits not jurisdictional; may be waived for equitable reasons).

   b. Love v. Pullman Co., 404 U.S. 522 (1972) (Title VII requirement that charging party go first to state agency may be met for charging party by EEOC).

c. Mohasco Corporation v. Silver, 447 U.S. 807 (1980) (simplified rules for availability of 300-day filing period to file EEOC charges).

d. Delaware State College v. Ricks, 449 U.S. 250 (1980) (defines when discrimination occurs).

e. United Air Lines v. Evans, 431 U.S. 533 (1977) (must file a charge within the statutory time limits after discrimination occurs).

f. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (can proceed with EEOC and sue under § 1981 simultaneously).

g. Electrical Workers, IUE v. Robbins & Meyers, Inc., 429 U.S. 229 (1976) (filing grievance under union contract does not affect Title VII time limits).

h. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (losing an arbitration under a union contract does not necessarily bar a Title VII suit).

i. Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) (state court discrimination decision will be given preclusive effect in later federal court litigation).

j. General Telephone Company of the Northwest v. EEOC 446 U.S. 318 (1980) (EEOC may bring class-type suit without complying with Rule 23 of Federal Rules).

k. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) (no time limits on EEOC processes).

l. Chandler v. Roudebush, 425 U.S. 840 (1976) (federal employees entitled to trial de novo).

m. Brown v. General Services Administration, 425 U.S. 820 (1976) (Title VII provides only remedy for federal employees attacking discrimination).

n. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) (Title VII class action plaintiffs must meet normal Rule 23 requirements).

o. General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982) ("Across-the-board" doctrine does not excuse compliance with Rule 23).

p. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (circumstances under which prevailing defendants can obtain attorney's fees).

4. Examples of court decisions establishing substantive principles under Title VII:

   a. Griggs v. Duke Power Company, 401 U.S. 424 (1971) (the most important court decision under Title VII; established the disparate impact theory of discrimination).

b. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) (fourth in a series of Supreme Court decisions that establish the tripartite order and allocation of proof in disparate treatment cases).

c. Teamsters v. United States, 431 U.S. 324 (1977) (clarified the relationship between discrimination and seniority).

d. Hazelwood School District v. United States, 433 U.S. 299 (1977) (established the principle that whether or not discrimination occurred must be evaluated in the context of the time-frame relevant to the litigation; set major principles with respect to statistical proof in class-type cases).

5. It would take well over a decade to finalize similar principles in the context of a new statutory scheme.

B. Two Separate Schemes, One at the EEOC and One in the Justice Department, Would Totally Confuse not Only Discriminatees But Also Their Lawyers and Other Professionals.

If, for example, an Hispanic who is legally entitled to work but is not a citizen is denied employment for what he believes to be discriminatory reasons, under the proposed statutory scheme, where should he go? He may be the victim of national origin discrimination. If so, he should go to the EEOC. Or he may be the victim of alienage (citizenship) discrimination. If so, he should go to the Justice Department. Moreover, the new bill appears to give some forms of national origin discrimination relief to the Justice Department. If so, the charging party should go to the Justice Department for national origin discrimination, and not to the EEOC. It would of course be far easier for charging parties if they simply did what hundreds of thousands of charging parties have already done, go to the basic federal antidiscrimination agency, allege in a single charge to that agency both national origin and alienage discrimination, and let the agency investigate.

C. Enormous Duplication of Resources and Manpower Would Result from Having Some Types of Discrimination Covered by Title VII and Administered by the EEOC and Other Types of Discrimination Covered by a New Statutory Scheme Administered by the Justice Department.

The EEOC has created an enormous organization. It has hundreds, if not thousands, of procedural rules. It has hundreds, if not thousands, of forms which have developed. It has agreements with various state antidiscrimination agencies. It has work-sharing arrangements with various federal agencies. Under the proposed statutory scheme, all this would start anew in the Justice Department. Totally new people would have to be hired, and trained. Work-sharing arrangements would have to be negotiated with the EEOC. Offices would have to be opened around the country.

The new Justice Department antidiscrimination agency would have to publicize its existence and its office locations and its procedures. There would obviously be enormous duplication.

D. Alienage (Citizenship) Discrimination Cannot be Tenably Argued to be More Important than Race, National Origin, Sex or Age Discrimination.

The only conceivable argument in favor of creating a new statutory scheme to handle alienage discrimination is that it is very important, and should have a section of the federal government solely devoted to enforcing it. No matter how important it may be, no one could tenably contend that prohibitions against alienage discrimination are more important than prohibitions against race, national origin, sex and age discrimination. If Title VII and the EEOC should be more effective, Title VII should be amended and the EEOC given additional power. It makes no sense to create a special statutory scheme for this one form of discrimination.

III

WHILE THERE IS SUBSTANTIAL RACE AND NATIONAL ORIGIN DISCRIMINATION, THERE IS AT PRESENT VIRTUALLY NO ALIENAGE (CITIZENSHIP) DISCRIMINATION; H.R. 3080 WOULD NOT LOGICALLY SEEM TO CREATE ANY ADDITIONAL INCENTIVE FOR EMPLOYERS TO DISCRIMINATE ON THE BASIS OF ALIENAGE AS OPPOSED TO NATIONAL ORIGIN; THESE FACTORS CALL INTO QUESTION THE NEED FOR ANY ANTIDISCRIMINATION PROVISION IN H.R. 3080

I have been practicing labor law for over two decades, and am a member of a law firm with a huge labor law practice. I have seen hundreds, if not thousands, of allegations, many false, some true, of discrimination on the basis of race, color, national origin, and sex, among other bases. I have never encountered a case of citizenship discrimination, as opposed to national origin discrimination. I am aware of the Supreme Court decision in Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) (Title VII does not cover citizenship discrimination), which did present a case of an employer that did not discriminate on the basis of national origin but did discriminate on the basis of citizenship, but such allegations are, to put it mildly, extremely rare. I do not believe citizenship discrimination, as opposed to national origin discrimination, to be a meaningful problem.

Presumably, the argument has been made that if H.R. 3080 becomes the law, because of the potential for penalties, there will be an increase in citizenship discrimination. I do not think this withstands analysis. It is certainly possible that if an employer might subject itself to significant penalties by hiring illegal aliens, it will adopt a policy of not hiring anyone who seems "foreign." This would be national origin discrimination, and already prohibited by Title VII. It defies common sense to believe that an employer trying to protect itself against penalties would do so by carefully interviewing people who seem "foreign," and hiring those who turn out to be citizens, while rejecting non-citizens who produce proof that they have a legal right to reside and work in this country.

In short, citizenship discrimination is not a meaningful problem at this time, and while there may be an increase in national origin discrimination because of H.R. 3080, this is dealt with by existing law, and I do not foresee any increase in citizenship discrimination. I therefore see no need whatsoever for an antidiscrimination provision in H.R. 3080. I feel Title VII's prohibition of national origin discrimination is sufficient.

IV

SPECIFIC COMMENTS ON SPECIFIC SECTIONS OF H.R. 3080

All section references are to subsections of Section 274B.

A. Section (a)(1) (page 14, line 13) - The bill restricts prohibited practices to discrimination in hiring or recruitment. Title VII applies to all employment conditions. Why is there no prohibition, for example, of job assignment or pay discrimination?

B. Section (a)(1)(A) (page 14, line 19) - There is no reason to prohibit national origin discrimination since it is already covered by Title VII.

C. Section (a)(2)(A) (page 15, line 1) - There is no reason to cover employers with three or fewer employees; there should be consistency with Title VII, which applies to employers with 15 or more employees.

D. Section (a)(2)(B) (page 15, line 3) - National origin discrimination is prohibited but then exempted if covered by Title VII; this is complex and confusing.

E. Section (a)(2)(C) (page 15, line 8) - There should be a bona fide occupational qualification provision similar to Title VII's.

F. Section (b)(1) (page 16, line 14) - Creates a Special Counsel within the Justice Department; this will require a huge organization.

G. Section (b)(1) (page 16, line 24) - Requires that the charging party personally serve a notice of the charge within 10 days. Why should the charging party do this as opposed to the government? There will be much litigation over this clause. The manner of service is not clear, and what happens if it is not properly served is not clear.

H. Section (b)(2) (page 17, line 4) - This section prohibits overlap with the EEOC and says that no charge may be filed if a charge has been filed with the EEOC. This is absolutely unintelligible. A charging party will not know whether he or she has been victimized by national origin or citizenship discrimination. A careful charging party would want to file with both agencies, yet this section seems to prohibit such an action.

I. Section (d)(1) (page 18, line 18) - The Special Counsel is directed to investigate each charge and make a determination of reasonable cause within 120 days. This time limit is absolutely unrealistic, and will never work.

J. Section (d)(2) (page 19, line 5) - This section authorizes a charging party 120 days after filing a charge to file a complaint directly with an administrative law judge. There are no procedures as to how to do this. How long can the charging party wait after 120 days? Apparently indefinitely.

There are no time limits whatsoever if the charging party initially files with the Special Counsel. Administrative law judges do not have procedures geared to receiving complaints directly from lay individuals.

K. Section (d)(2) (page 19, lines 5-14) - This section, allowing "private actions," makes reference to a "pattern or practice of discriminatory activity" charge, but does not repeat the reference with respect to filing a complaint before an administrative law judge. The statute is hopelessly ambiguous with respect to whether or not pattern or practice or class-type allegations may be brought by the charging party or the Special Counsel before an administrative law judge. There are no procedures.

L. Section (e)(1) (page 20, line 1) - This allows a hearing within five days after serving the complaint. This is absolutely impossible. No one could litigate any form of discrimination case on five days' notice.

M. Section (f)(1) (page 21, line 9) - The statute simply says the administrative law judge shall take testimony. It says nothing about the rules of evidence. It says nothing about standards of proof. It is hopelessly ambiguous.

N. Section (f)(2) (page 21, line 14) - The statute authorizes subpenas to compel the attendance of witnesses in the production of evidence. It requires reasonable access to examine evidence. What does this mean? Can there be depositions? Can there be interrogatories? Can one try a pattern or practice type of case without some minimal discovery?

V

CONCLUSION

There is next to no citizenship discrimination, as opposed to national origin discrimination. The statute will not create any. It does not need an antidiscrimination provision.

If an antidiscrimination provision is deemed necessary, there should not be a separate statutory scheme. Title VII should be amended in the following respects:

(1) Section 703 of Title VII should be amended to add as a prohibited basis of discrimination "citizenship";

(2) There should be a special provision added defining citizenship discrimination as being applicable only to a citizen or intending citizen, as defined in H.R. 3080;

(3) Citizenship should be a basis for a bona fide occupational qualification as defined in Section 703(e) and bona fide occupational qualification with respect to citizenship shall be specifically defined as including, but not limited to, the occurrences set forth in H.R. 3080, Section 274B(a)(2)(C).

Those are the major changes to Title VII which would have to be made to accomplish the objectives of Section 274B of H.R. 3080. There may be additional minor technical amendments which would have to be made.

Mr. **Mazzoli**. The gentleman's time has expired. I'll yield myself 5 minutes to get started.

When you called one section of our bill appalling, I was momentarily concerned; but then I realized you didn't say it was nonsense or that it was crazy, or that it was preposterious or ridiculous. I figured we were making some progress, when I'm only appalling I'm at least crawling up the ladder.

Mr. **Grossman**. Just poorly thought out.

Mr. **Mazzoli**. Well, I applaud your choice of words, you are a walking Roget Thesaurus there, and I think that's really quite, in itself, commendable. I've found very few more colorful witnesses in all of our 6 years of wrestling with this bill.

Mr. **Grossman**. Well, nobody is paying me. I'm paying my own expenses. If I'm going to be here, I might as well have some fun.

Mr. **Mazzoli**. I think maybe that from now on if we don't pay the witnesses we'll have a better sideshow or show than we have if we pay them.

Mr. **Grossman**. I couldn't even get you guys to cover my hotel bill.

Mr. **Mazzoli**. I tell you what I appreciate, is that you are one of the few people who—and using another one of these wonderful terms we have on the Hill—you're one of the few witnesses we've had who's really on the ground in the sense of people out in the practice and out in actual work. So many of us are creatures of this kind of environment of academic inquiry or bureaucratic inquiry, but for you, you bring with you the background of at least being there, both in the representational capacity now as an attorney in practice, and then of course, earlier, with the Legal Aid Society. So, you have a——

Mr. **Grossman**. I did both at the same time.

Mr. **Mazzoli**. At the same time.

Well, let me ask you this, then. I mean, since you are on the ground, you've talked about it, and I think you earlier said something at least as an aside that national origin and alienage are either together or they're very closely allied, have you seen, do you see now, have you seen in the past, evidence of widespread or even narrow discrimination based upon alienage which would create the need for some solution recommended by the gentleman from Massachusetts?

Mr. **Grossman**. No. I've seen tremendous amounts of national origin discrimination. That is a terrible social problem. In 20 years of practicing labor law and in being associated with Legal Aid, I have never personally encountered a case of alienage as opposed to national origin discrimination. I'm aware of the Espinoza case; that is a published decision where an employer did say, "I will hire Hispanics but only citizen Hispanics." But that is unique.

We have had the Farah case, which, since 1974, has said that section 1981 provides a remedy for alienage discrimination. Whether it does or not is debatable; probably does, but the courts haven't definitively spoken. But if there was alienage discrimination, this was an invitation to sue and we haven't seen any such lawsuits. I am unaware of citizenship/alienage discrimination as opposed to national origin discrimination, and I do not believe in the real world the threat of employer sanctions will create it.

The threat of employer sanctions may well create very substantial national origin discrimination. I can see a lot of employers not fully understanding how easy it is to comply with the bill, as Mr. Reynolds said, but a lot of employers won't understand that. It won't be logical, but they'll say, "Oh, the hell with this, I'm not going to hire any of these foreign people." And I can see that happening because of your sanctions, but that's national origin discrimination.

In the real world no one is going to say, all right, Mr. Mazzoli, let me see your papers Well, let's see, oh, you're legally entitled to be here and work but you're not a citizen, that's not good enough for me. In the real world, what's going to be created in terms of discrimination by your employer sanctions is, I'm not going to mess with those foreign people. And that's national origin discrimination, already prohibited by title VII if you have 15 or more employees. If you think the world's biggest problem is employers with 4 to 14 employees, you can simply amend it.

Mr. MAZZOLI. I guess someone brought up the complaint, well, if it's a tremendous problem with the band between 4 and 15, how about the band between 1 and 3? I mean, there's a certain amount of, you know, the Beverly Hills house boy or the Beverly Hill maid situation, that if——

Mr. GROSSMAN. If you're talking Beverly Hills, they have four or five. In my neighborhood we only have a gardener and a housekeeper, that's two.

Mr. MAZZOLI. See, I'm speaking from Kentucky, from one of those backwoods areas. So, I mean, that's a very different thing.

Mr. GROSSMAN. My wife said, "Make sure they don't get it down to two." [Laughter.]

Mr. MAZZOLI. I tell you what, we've got to invite you back more often. Maybe when you're not in a comedy store on the strip, then you come and talk to us; OK?

Mr. GROSSMAN. No, this is terribly serious. I'm sorry. I don't mean to make light of it. The comments I made earlier, although I used colorful language I feel very, very strongly about: do not saddle us with a second Federal agency in discrimination.

Mr. MAZZOLI. Your life has certainly measured up to that exact standard.

My time has expired and the gentleman from Wyoming is recognized for 5 minutes.

Senator SIMPSON. Well, that was refreshing, because I see your background: law review, Yale Law School, a "cracker-jack" law firm, a civil libertarian and a guy who cares. That's why I think it's so important to hear you speak, a person who has been involved in legal aid societies, and, I imagine, a couple of child abuse cases and all the ghastly stuff that's out there, but there is a reality to the practice of law, and it has to do with the things you see in your legal aid and what you do in trying to assist human beings. It sounds to me as if that's the kind of person you are, and your background discloses that. I would hire you to represent me if I were involved a situation. You seem to have a remarkable grasp of the realities of this thing, and that's what so tough.

I have a paper here, and I hate to—well, I must be specific. It's a paper which is used, and it's prepared by MALDEF. It's a very good organization. I know some of their officers, I've debated with some. They're delightful people.

Mr. **Grossman**. I received their 1978 civil rights award.

Senator **Simpson**. You did.

Mr. **Grossman**. Yes.

Senator **Simpson**. You received the MALDEF 1978 Civil Rights Award.

Mr. **Grossman**. Out in Los Angeles.

I have a high regard for the organization. I'm sorry they didn't give you a good paper.

Senator **Simpson**. No, no, they did. It's an interesting paper. But, in their own paper they confused national origin with discrimination based on alienage. And if they do it——

Mr. **Grossman**. A lot of your witnesses had that problem here today.

Senator **Simpson**. Yes. They've interchanged the terms. And that's all I've been saying, that's all that this Congressman has been saying, that's all that Ron Mazzoli has been saying. I'm not saying that we don't go out and protect and do what we have to do as a responsible Congress, but for Heaven's sakes, to see the magnificent diversion, in a way a duplicity, a remarkable duplicity, by sharp people who inject and interchange the terms of discrimination based on national origin and discrimination based on alienage. That offends me. I get really tired of it. They still bug it around, I tell you, it's all over.

Mr. **Grossman**. In the real world there's an awful lot of national origin discrimination, and you just don't find alienage discrimination separate from national origin discrimination.

Senator **Simpson**. Well, that was essentially my significant question, and that is, it seems to me—and with your background, could you just elaborate briefly how often you see this issue of national origin and alienage discrimination either confused or occurring together, and is that common to you as you see it?

Mr. **Grossman**. Well, you just don't see alienage discrimination. You just don't see an employer who, "Well, hiring Hispanics is fine, but I'm not going to hire any Hispanic who is legally entitled to work here but is not a citizen." You just don't see that. You see all kinds of out and out bigotry, "I will not hire Hispanics," "I will not hire people who seem foreign," but you just don't—I don't even see allegations.

For 7 years, until I relinquished it to my partner recently, I headed the largest management labor law practice in in the Southwestern United States while at the same time doing the Legal Aid work. And I've never even seen an employer accused of alienage discrimination. I've seen thousands of accusations of national origin discrimination, some meritorious, some not meritorious.

Senator **Simpson**. Well, that sure matches everything I've done, and that's why, when we get into the issue of who's trivializing what in immigration reform, there's a good example of who got to trivializing it when they got into this issue of discrimination based on alienage. It isn't there; if it were there, we would have known about it. This place would have known about it, the Senate would have known about it. That's what we're here for. We don't let those things go on in the United States, we have a pretty good record.

Mr. **Grossman**. Now, I do fear that there may be a rise of national origin discrimination, because of uninformed people fearful of penalties under Simpson-Mazzoli.

Senator **Simpson**. OK.

Mr. **Grossman**. But that's already covered by existing law.

Senator **Simpson**. And then—Mr. Chairman, just 30 seconds——

Mr. **Mazzoli**. Surely.

Senator **Simpson**. I think this disappointed people who were looking to hang on by their toe nails like they do with this bill, you know, helping me along; it's like having the Boston Strangler massage your neck. They say, "We want to help, Al, help you and Ron and all of you. You're delightful and we want to help." They don't want to help at all. They want to find some new and fascinating diversion, and this is the latest copy of that.

I felt strongly about the Kennedy amendment. In the debate I accepted the Kennedy amendment which says that if employer sanctions are the sole cause of discrimination, and it doesn't say what kind, then the whole bill is trashed after an activating device in a swift fashion by this Congress. I like that, I think that's what we ought to be about. And that's what's in the Senate bill.

Mr. **Mazzoli**. The gentleman's time has expired.

Again, the gentleman from Massachusetts, who is not here, doesn't need my protection or defense, but having worked with the gentleman for these last 6 years on the issue, I'm sure that this amendment of his is not meant to be any diversion or any effort to defeat the bill. As a matter of fact, the gentleman has gloriously taken a lot of "body blows," I think, as all of us have, in behalf of the bill, and so I think this represents a genuine effort on his part to cure some of the defects.

But obviously, as you said, you know, there's certainly a clear difference of opinion on it.

Senator **Simpson**. Mr. Chairman, may I just say, that is very important. Barney Frank had been one of the early supporters of this bill, talked with me way back down the line, wants it as badly as I do, as Chuck Schumer. It is nothing in the form of a smoke screen for him, I agree with you totally.

Mr. **Grossman**. I think Barney Frank could achieve every objective he has by amending title VII to include alienage discrimination and changing the 15 employee limit and the 20-week-per-year requirement.

Mr. **Mazzoli**. Yes, excellently said. That, I'm sure, is going to be something which we will study carefully.

Mr. **Grossman**. And, indeed, I would think, based on my knowledge of Barney Frank's views, that he would be very sympathetic to my view that you shouldn't just prohibit hiring discrimination. If alienage discrimination should be prohibited, it should be prohibited entirely, not just hiring discrimination.

Mr. **Mazzoli**. The gentleman from California.

Senator **Simpson**. Excuse me, I must go. I won't get back. I thank you for your courtesies, all of you here in the House. Thank you.

Mr. **Grossman**. Senator, I admire your efforts and hope you succeed.

Senator **Simpson**. Well, I admire you, sir.

Mr. **Mazzoli**. The gentleman is recognized for 5 minutes.

Mr. **Berman**. Thank you, Mr. Chairman. I hate to breakup this love fest.

Mr. Grossman, I have a great deal of respect for what you have done in this area. You seem to take us for idiots.

Mr. **Grossman**. If you support the discrimination provisions that are now in H.R. 2080, you are making a foolish mistake.

Mr. **Berman**. You mean H.R. 3080.

Mr. **Grossman**. H.R. 3080.

Mr. **Berman**. You sort of cavalierly——

Mr. **Grossman**. You're obviously not an idiot. I know something about your career, too, and you've had a very accomplished career as a lawyer and as a Congressman from my own county.

Mr. **Berman**. How did we start this love fest here?

Mr. **Grossman**. You are obviously a very astute person.

Mr. **Mazzoli**. Let me start the clock over, what do you say? You've got 5 minutes, now you start with 5. [Laughter.]

Mr. **Grossman**. I get worried when people start saying nice things.

Mr. **Berman**. So do I.

You cavalierly threw out the idea:

> Hey, you guys, if you want to get into alienage discrimination, amend the Civil Rights Act for alienage; and if you want to cover the employees from 4 to 15, reduce the coverage; if you want to get at the seasonal workers, deal with the 20 weeks in a calendar year standard.

Barney Frank may be a lot of things, but he ain't dumb. And he knows the other ways to do this, the better ways to do this, the ways to avoid all the very legitimate problems you have raised—and I think you've raised very good ones—regarding the procedural mess all of this will cause us. But he thinks, I think, a lot of people think, we can't accomplish that, we can't achieve these things, we can't correct all the miserable procedural obstacles to a quick action in a Federal court on discrimination because of EEOC backlogs and inefficiencies and the absence of effective enforcement powers in that agency. We can't deal with all of that.

Now, of course—going back to what Barney Frank said earlier—of course you haven't seen alienage discrimination, and of course you haven't needed an alien prohibition, because it's never been illegal until this bill passes to hire an alien. When this bill passes it will be illegal to hire certain kinds of aliens. There is a fear that people without any ill motive whatsoever, but because public policy, the law, the potential for civil and maybe criminal liability, we'll drag them in, that they will have an incentive to be very skeptical about the hiring of certain aliens. On public policy grounds, we will have said, "Watch out for certain kinds of aliens." And they know that there are phony documents around, and they know that there are all these problems. And maybe they're sophisticated enough to know that if they keep a record—and the House bill version passes and they keep a record of every driver's license and social security number of every applicant—they'll have a fine affirmative defense after the INS raid, and after their work force has been disrupted, and after the proceeding has started against them for violating the law, they'll have a fine affirmative defense.

I think it is not implausible to say there is some real justification for concern. And you may be right, it may manifest itself in national origin discrimination. I do tend to think it will be more quickly "watch out for Hispanics who don't speak English perfectly," than it will be "have a birth certificate to go with everyone." But it might be.

Mr. **Grossman**. That's national origin.

Mr. **Berman**. That's national origin. But, "I want to see a birth certificate or a naturalized citizenship document before anyone gets a job in this place, because I don't want to take the chance. I think it's a terrible law, I think it's unfair, but I don't want to take the chance that I'm going to jail because I hired a, quote, 'illegal alien,'" unquote.

Mr. **Grossman**. Well, now, neither of us can prove our views on that. My view is that the employer is going to either say, "If you're foreign, get lost," or, "Let me see your papers."

Mr. **Berman**. But we just had two—we had the guy from the National Association of Manufacturers say, "Yeah, you're darn right I'd rather hire the American than the alien."

Mr. **Grossman**. I don't happen to agree with him, but I can see how one can view it that way.

Mr. **Berman**. You're right, we don't agree with him. And what he said maybe isn't even so preposterous. But we can't dismiss the possibility that there will be discrimination based on alienage; I mean, he said he would do it.

Mr. **Grossman**. Amend title VII, add alienage.

Mr. **Berman**. Well, but if we could pass it.

Mr. **Grossman**. Yeah, but your first point is, the political realities of the situation are that we can't do it right, so we have to have this fouled up mess. I can't help you there.

Mr. **Berman**. I know you can't.

Mr. **Grossman**. If the realities are that you've got to do this, which makes no sense, because that's the political realities.

Mr. **Berman**. It makes——

Mr. **Grossman**. You don't need me, I can't help.

Mr. **Berman**. You're right. What you should say is, "It's preposterous unless there's some real compelling political reason why you can't address the problem the best way." Maybe we're wrong about that evaluation, and maybe we should check that out further; but I just don't think there is an underlying political logic to the choice of this difficult and, perhaps, not ideal—I guess "not ideal" may be an understated way of looking at it——

Mr. **Grossman**. "Not ideal" is somewhat understated, yes.

Mr. **Berman**. Reason, and just take that into a little consideration. It is a political problem.

Mr. **Grossman**. I can't help you.

For political reasons you have to pass a bad scheme?

Mr. **Berman**. It won't have been the first time.

Mr. **Grossman**. It won't?

Mr. **Mazzoli**. The gentleman from Texas is recognized for 5 minutes.

Mr. **Bryant**. Well, I would like to echo a little bit what Mr. Berman said. I listened with interest to all of your observations, and I'm particularly interested in the deficiencies you found in the

Frank amendment with regard to lack of breadth. And also, of course, I think everyone on this committee would agree we'd rather have one agency do it in handling the discrimination than creating another one.

Mr. **Grossman**. Well, what are we talking about?

Mr. **Bryant**. Well, we're talking about this, I found myself becoming increasingly defensive in hearing you call these efforts preposterous and so forth. I wasn't on this committee last year, but the fact of the matter is, as Mr. Berman was pointing out, if the people of one party or one viewpoint don't want us to pass a broadening of title VII, as you advocate would be the wisest way to do, then there is nothing to do, no option, except to go and try and do it another way. And the provision that's been proposed here is the other way, and, therefore, it was not preposterous. It may not be the best way, but it isn't preposterous and ridiculous.

Mr. **Grossman**. Viewed in the abstract, it is a preposterous scheme——

Mr. **Bryant**. But you see, we can't view things in the abstract, and that's all I'm saying to you. And I feel the need to issue a retort to you in that regard. We can't view it in the abstract.

The question is, I'm concerned that brown people, and black people, and other folks who may not be in the majority where they live, don't get discriminated against. And I want a mechanism that——

Mr. **Grossman**. We have the same concern.

Mr. **Bryant**. Right. But what you advocate is the best of all possible worlds and I'm working in a job where I don't get the best of all possible worlds, we get what's possible. And so, when what we go for as possible isn't the best, it isn't ridiculous, it just isn't the best. And I think that's what——

Mr. **Grossman**. Well, doing it through title VII is better for brown people, and black people and noncitizens.

Mr. **Bryant**. Sure it is, and I think that sounds like a very good idea. But the point of the matter is, it is clear that we can't accomplish that. So then what do we do?

My question to you is: If we can't accomplish that, then what do we do?

Mr. **Grossman**. If you're telling me that you can't pass a sensible law because——

Mr. **Bryant**. No. I'm telling you we can't——

Mr. **Grossman** [continuing]. Nobody will vote for it——

Mr. **Bryant**. I'm telling you we probably can't broaden title VII, drop it down to four or more employees, and make it apply to national origin the way that you suggest.

If we can't do that politically but we can do this, what should we do?

Mr. **Grossman**. I can't conceive of anybody who would vote to create a special prohibition of national origin for 4 to 14 people but wouldn't agree to make title VII applicable to national origin and 4 to 14 people.

Mr. **Bryant**. But you don't work where I work, see, that's the difference, and that's the reason I feel the need to respond to you.

Mr. **Grossman**. I am here to tell you what makes sense in the real world, what would be a good thing for charging parties, what would be a good thing for black and brown people, what would be a good thing for employers. I'm good at that, I have some knowledge to share with you and tell you about that. I will not purport to lecture you on the political process, that's your field.

Mr. **Bryant**. Well, in order to deal with your very strong statement in opposition to the Frank amendment, my question to you is: If it is not possible in this Congress to broaden title VII, then what should we do in order to deal with the probability of increased discrimination on the basis of national origin?

Mr. **Grossman**. Give the EEOC some extra money to enforce the existing national origin prohibitions; because, as I've also said, I don't think alienage discrimination, as opposed to national origin discrimination, exists in the real world.

I think you may well—I don't know this, but I think you may well—see an upsurge in national origin discrimination after the passage of Simpson-Mazzoli with employer sanctions. And I think it can be dealt with totally under existing law with the exception of the 4 to 14 people.

Mr. **Bryant**. That's what I'm talking about, the 4 to 14 people.

Mr. **Grossman**. The 4-to-14 employers, which I do not regard as the biggest problem in the whole world—if you do a study my guess is you'd find that maybe 2 or 3 percent of the employees in question work for employers that have more than 4 but less than 14 employees. But even there, national origin discrimination is under the great weight of authority covered by section 1981, at least where it manifests itself, as color discrimination, which is almost always the case. In other words, section 1981 might not apply to the Swede but it would apply to the Hispanic coming across from Mexico. So, even for the 4-to-14 group, national origin discrimination is pretty clearly attackable under section 1981, without regard to whether alienage discrimination is, and alienage discrimination probably is; so, they aren't totally without a remedy.

Mr. **Bryant**. So is your answer, then, that if we can't broaden title VII that we ought to just——

Mr. **Grossman**. Yes.

Mr. **Bryant** [continuing]. Not act, just don't act?

Mr. **Grossman**. If you think that alienage discrimination as opposed to national origin discrimination is a big problem, or if you think that the 4-to-14 employer is a big problem.

Mr. **Bryant**. That's my problem.

Mr. **Grossman**. The 4 to 14 employer?

Mr. **Bryant**. Yes.

Mr. **Grossman**. Well, on the national origin side there is clearly a remedy under section 1981, if you're talking about Hispanics or people of color, without getting into the debate about whether Hispanics, or causcasians, or brown or whatever. The overwhelming majority of Federal courts have held that 42 United States Code, section 1981 provides complete protection against national origin discrimination when based on a perception of different color.

Mr. **Bryant**. You need a private lawyer to do that, don't you?

Mr. **Grossman**. Yes.

Mr. **Bryant**. You can't go to EEOC, you've got to go hire an attorney to bring that case.

Mr. **Grossman**. Yes. Although, there is a provision for attorneys' fees if the attorney prevails; which, of course, is a powerful incentive.

Mr. **Mazzoli**. The gentleman's time has expired.

The gentleman from Florida is recognized for 5 minutes.

Mr. **McCollum**. Thank you, Mr. Chairman.

I, unfortunately, wasn't able to be here for most of the hearing today, but I find Mr. Grossman's testimony to be the most lucid summary of the situation that I could imagine, just walking in and hearing one witness. And looking over the testimony sitting in front of me, and glancing there while the questioning was going on, it seems to me you've done a beautiful job of summarizing why we shouldn't do this. And I happen to agree with that.

I also can't see, for the life of me, where—and I disagree with my colleagues on this—why we couldn't amend title VII. I don't see why it would be more difficult than this, and that's politically speaking from my standpoint. If that's what needs to be done, then that's what we ought to be doing. So, while this committee can't do that attached to this bill, that's maybe beyond the bounds of the rules and the parliamentary procedures, as you said so well there's no reason why, if you can get enough votes for this one which is so broad—and I think it's going to be very hard to get enough votes for it, once it's clearly explained like you have and people understand the problems with it; but certainly, if you could get these votes, you should be able to get those votes.

So, you said it all and said it well, and I have no questions to ask. I think I just want to thank you for coming.

Mr. **Mazzoli**. Would the gentleman yield to me in his time?

Mr. **McCollum**. I'd be glad to yield.

Mr. **Mazzoli**. I think the gentleman made an interesting point, and I think it might be useful to note that last year and the years earlier, when our bill left this committee, this full committee, it wound up going to other committees because of jurisdictional connection—Ways and Means, Energy, Education and Labor, as well as Agriculture. So, I see it not beyond the province of this committee or its charge to deal with this discrimination factor if it decides to go with title VII amendments, because the Education and Labor Committee will get this bill anyway. I mean, if that is their baliwick, and I assume that it is, then they'll get the bill anyway.

Mr. **McCollum**. Well, maybe that's the answer, Mr. Chairman, the point.

Mr. **Mazzoli**. So we may, when the subcommittee gets to markup, decide that.

May I, on behalf of my colleagues, thank you very much, Mr. Grossman. You know, like I say, you're one of the rare people who has come here, apparently really on his own, just to say what you feel like needs to be said. And think it has helped us.

Mr. **Grossman**. Congressman, your committee contacted me and asked me to.

Mr. **Mazzoli**. Well, I tell my friend from Florida that, you know, if he had to pick one place to come in to sort of get a quick summary, plus get your sinuses cleaned out, this is the way to do it, all in one move.

So, thank you all very much, and the subcommittee stands adjourned.

[Whereupon, at 2:18 p.m. the subcommittee was adjourned.]

[The following was received for the record:]

APPENDIX

QUESTIONS SUBMITTED BY SUBCOMMITTEES FOR THE RECORD AND RESPONSES

SANCTIONS STRUCTURE AND DISCRIMINATION

- DOES THE REMOVAL OF CRIMINAL PENALTIES FOR INDIVIDUAL UNLAWFUL HIRINGS IN H.R. 3080 DECREASE THE POTENTIAL FOR EMPLOYMENT DISCRIMINATION?
- WOULD DECREASING THE LEVEL OF CIVIL FINES MINIMIZE THE DISCRIMINATION POTENTIAL? WOULD YOU FAVOR THAT?
- WHAT TYPE OF PENALTY STRUCTURE - CIVIL OR CRIMINAL - WOULD HAVE THE LEAST POTENTIAL FOR EMPLOYMENT DISCRIMINATION?
- EARLIER HOUSE BILLS HAD ALWAYS INCLUDED A WARNING OR CITATION FOR A FIRST OFFENSE. THIS EMPLOYER "FREE FIRST BITE" WAS DESIGNED TO ENSURE CONSCIENTIOUS EMPLOYERS THEY WOULD NOT BE SUBJECT TO CIVIL OR CRIMINAL PENALTIES BEFORE THEY BECAME AWARE OF THE PROHIBITION ON HIRING UNDOCUMENTED ALIENS. IT WAS THOUGHT THAT AN EMPLOYER WOULD NOT HAVE TO "PLAY IT SAFE" AND THIS WOULD THEN OPERATE TO MINIMIZE THE POTENTIAL FOR DISCRIMINATION. WHAT IS YOUR VIEW ON THE CITATION STAGE AS AN ANTI-DISCRIMINATION PROVISION?

VERIFICATION SYSTEM AND DISCRIMINATION

- DOESN'T THE FACT THAT THERE IS A UNIFORM VERIFICATION PROCEDURE WHICH MUST BE FOLLOWED FOR ALL PROSPECTIVE EMPLOYEES ELIMINATE, OR AT LEAST MINIMIZE, THE DISCRIMINATION POTENTIAL?
- THE JUSTICE DEPARTMENT, IN ITS TESTIMONY, POINTS OUT THAT THE VERIFICATION PROCEDURE IN H.R. 3080 IS "SIMPLE", "STRAIGHTFORWARD", AND "EXPLICIT" AND THAT IT IS NOT NECESSARY "THAT THE EMPLOYER BE EXPERT IN DETECTING FALSE DOCUMENTS", SINCE H.R. 3080 PROVIDES THAT EMPLOYER COMPLIANCE IS SUFFICIENT IF THE DOCUMENTS APPEAR ON THEIR FACE TO BE GENUINE. WHAT IS YOUR RESPONSE?
- AREN'T THE VERIFICATION PROCEDURES SET OUT IN SUCH DETAIL THAT A BONAFIDE EMPLOYER CAN COMPLY WITHOUT A GREAT DEAL OF INCONVENIENCE?
- WHAT SPECIFICALLY IN THE VERIFICATION PROCEDURE WOULD LEAD TO GREATER DISCRIMINATION THAN IS NOW OCCURRING?
- H.R. 3080 PROVIDES A $1,000 CIVIL PENALTY FOR FAILURE TO COMPLY WITH THE VERIFICATION/PAPERWORK REQUIREMENTS. WOULDN'T THIS ENCOURAGE EMPLOYERS TO FOLLOW THE VERIFICATION PROCEDURES IN A UNIFORM FASHION (I.E. ASK ALL PROSPECTIVE EMPLOYEES) AND WON'T SUCH A FINE MINIMIZE THE OPPORTUNITY FOR DISCRIMINATION? DO YOU FAVOR A FINE FOR VERIFICATION/PAPERWORK VIOLATIONS?

- Some critics of sanctions maintain that the confusion surrounding Congressional consideration of this legislation has already led to discrimination in some areas of the southwestern United States and that discrimination has already increased in anticipation of passage of this bill. In support of their criticism, it is maintained that employers don't understand the details of the legislation and their obligations under it. What is your response? Doesn't the lengthy education period in this bill minimize that possibility? Is the education period set forth in the bill sufficient and what recommendations would you have regarding the education of employers as to the nature of the sanctions and the verification procedure? Should this education period also include detailed information regarding the current state of the law on discrimination as well as the anti-discrimination protections that are ultimately included in this bill?

Discrimination Potential vs. Demonstrated Discrimination

- The Civil Rights legislation in the 60's was enacted in response to demonstrated and proven discriminatory activities. This legislation is an anticipatory response to discrimination that may flow from the enactment of legislation. Can you comment on these different legislative philosophies and approaches and are they necessarily inconsistent?
- To what extent have cases of discrimination on the basis of alienage arisen?
- Should Congress wait until discrimination occurs under a sanctions approach before enacting anti-discrimination provisions such as the Frank amendment?
- Isn't it essential to include such provisions in a sanctions bill, particularly in view of the overwhelming fear of discrimination on the part of Hispanics and other ethnic groups?
- Should there be a sunset on this anti-discrimination provision and mechanism (as has been recommended for sanctions) if alienage discrimination does not occur or the existing mechanism for addressing national origin discrimination proves to be adequate?
- Is the Frank amendment redundant and unnecessary as suggested by the Department of Justice in its testimony?

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- The Department of Justice, in its testimony, indicates that there is merit to the Senate approach

> "of deferring for now the adoption of a separate nondiscrimination provision so as to allow for an informed evaluation of the need for such statutory language (and the shape it might take) on the basis of our experience with the employee-verification and employer-sanctions features of the current bill. In light of the proposed monitoring and reporting provisions of the bill, we can more realistically determine after enactment and a period of implementation whether there exists a real need for some sort of noniscrimination provision."

What is your response to deferring this issue until a later time?

ALIENAGE/CITIZENSHIP DISCRIMINATION

- DOES THE CIVIL RIGHTS ACT OF 1866 (42 USC 1981) PROVIDE SUFFICIENT PROTECTION AGAINST EMPLOYEMENT DISCRIMINATION BY PRIVATE EMPLOYERS BASED ON NATIONAL ORIGIN? ON ALIENAGE?
- WHAT IS YOUR READING OF THE FEDERAL CIRCUIT COURT DECISION IN GUERRA V. MANCHESTER TERMINAL CORP.? DOES THE GUERRA DECISION PROVIDE ANY HOPE OF RELIEF FOR EMPLOYMENT DISCRIMINATION BASED ON ALIENAGE THAT MAY RESULT FROM THIS LEGISLATION? IN VIEW OF THE UNCERTAIN NATURE AS TO WHETHER THIS CIRCUIT COURT DECISION WILL BE FOLLOWED IN OTHER CIRCUITS (DISTRICT COURTS IN NEW YORK AND CALIFORNIA HAVE NOT FOLLOWED IT), SHOULDN'T CONGRESS ADDRESS THIS MATTER SPECIFICALLY BY LEGISLATION SUCH AS THE FRANK AMENDMENT?
- THE ABA NOTES IN ITS TESTIMONY THAT THE FEDERAL GOVERNMENT SHOULD NOT FOLLOW "A DIFFERENT STANDARD THAN THAT FOLLOWED BY STATES" WITH REGARD TO MAKING DISTINCTIONS FOR EMPLOYMENT PURPOSES BASED ON ALIENAGE. (THE SUPREME COURT HAS CONSISTENTLY STRUCK DOWN OVERLY BROAD STATE STATUTES THAT LIMIT EMPLOYMENT RIGHTS TO U.S. CITIZENS. STATE STATUTES HAVE ONLY BEEN UPHELD WHEN THE STATE HAS SATISFIED ITS BURDEN OF DEMONSTRATING THAT A U.S. CITIZENSHIP REQUIREMENT FOR EMPLOYMENT SERVED A COMPELLING STATE INTEREST OR AN INTEREST VITAL TO A STATE'S OWN POLITICAL COMMUNITY.) WHAT IS YOUR RESPONSE?
- SHOULD PRIVATE EMPLOYERS BE PREVENTED FROM ESTABLISHING A HIRING POLICY WHICH PREFERS U.S. CITIZENS OVER ALIENS WHO ARE ENTITLED TO WORK IN THIS COUNTRY? IF A "CITIZEN-PREFERENCE" HIRING POLICY IS ALLOWED, DOESN'T THIS RUN COUNTER TO THE FEDERAL MANDATE TO ALL LAWFUL ALIENS, INCLUDING PERMANENT RESIDENT ALIENS, REFUGEES, ASYLEES, AND LEGALIZED ALIENS THAT THEY OBTAIN EMPLOYMENT IN ORDER TO BECOME SELF-SUFFICIENT?

- The Conference compromise last year provided protection from discrimination only for those aliens entitled to work in this country who have evidenced an intention to become U.S. citizens. Is this scope of coverage reasonable? Should aliens be required to be on the path to citizenship in order to have these anti-discrimination protections?
- The ABA, in its testimony, has stated that "the fact of U.S. citizenship or lack of U.S. citizenship should be an irrelevancy in the hiring process." What is your response?
- To what extent are current discriminatory employment practices against Hispanics and other ethnic groups based on national origin versus alienage/citizenship?
- One witness has indicated that "there is next to no citizenship discrimination, as opposed to national origin discrimination. The statute will not create any." What is your response?
- Would extending the coverage of national origins discrimination under Title VII to employers of between 3 and 15 employees respond to this particular problem? Should Congress respond in the context of Title VII amendments rather than through this type of special legislation?
- Does the Frank amendment provide a preferred status to alienage/citizenship discrimination, since it creates a separate mechanism and procedures to deal with it. Does this mean that other forms of discrimination (i.e. based on race, religion) are less important?

- Is there any logical nexus between fililng a notice of intent to become a citizen and being protected against alienage discrimination? If not, what might be a more logical nexus?
- Under current law governing H-2 workers, an alien may be admitted to do a temporary job if capable "persons" in the U.S. cannot be found for the job. This apparently gives permanent resident aliens as much right to the job as U.S. citizens. Has this equality of opportunity under H-2 placed H-2 employers in a difficult position with regard to deciding whether to hire a U.S. citizen or a lawful resident alien?

Anti-Discrimination Mechanism

- Would you comment on the workability of the mechanism that has been proposed for processing discrimination complaints under the Frank amendment?
- What is your response to the Department of Justice's view that this mechanism is expensive and unnecessary?
- Should the proponents of this mechanism be required to carry the burden of proof that sanctions will result in discrimination? (In a related vein, the ABA has stated that "the burden of proof is on the proponents of such significant changes in our employment laws - i.e. sanctions - ... and that the proponents of sanctions have failed to demonstrate that the implementation and enforcement of sanctions ... will not result in discrimination against U.S. citizens or lawful immigrants authorized to work").
- The Department of Justice noted that "one thing that clearly is not needed is yet another separate bureaucratic apparatus charged with largely duplicative responsibility to investigate and prosecute parallel, if not overlapping, claims of employment discrimination."

  In essence, the Department of Justice recommends that Congress defer this issue at this time and instead await reports required under H.R. 3080 on the "actual enforcement experience" under the new law. What is your response?

TECHNICAL QUESTIONS

- THE LEGISLATION PROVIDES FOR A PRIVATE RIGHT OF ACTION FOR "PATTERN OR PRACTICE" DISCRIMINATION IF THE SPECIAL COUNSEL DOES NOT FILE A CHARGE WITHIN 120 DAYS AFTER RECEIVING IT. WHAT IS YOUR VIEW OF THAT PROVISION? ARE THEY SIMILAR TO THE PROCEDURES FOLLOWED IN CURRENT EEOC OR NLRB CASES? ONE WITNESS INDICATES THAT ADMINISTRATIVE LAW JUDGES "DO NOT HAVE PROCEDURES GEARED TO RECEIVING COMPLAINTS DIRECTLY FROM LAY INDIVIDUALS." IS THIS A SERIOUS PROBLEM AND CAN SUCH PROCEDURES BE DEVELOPED?
- H.R. 3080 ALSO PROVIDES THAT ANY PERSON FILING AN ANTI-DISCRIMINATION CHARGE "SHOULD BE CONSIDERED A FULL PARTY TO ANY COMPLAINT BEFORE AN ADMINISTRATIVE LAW JUDGE RESPECTING SUCH PRACTICE AND SUBSEQUENTLY SUCH APPEAL RESPECTING THAT COMPLAINT." WHAT IS YOUR COMMENT ON THIS PROVISION AND ARE ANY SUCH RIGHTS ACCORDED TO CHARGING PARTIES BEFORE EITHER EEOC OR NLRB?
- H.R. 3080 ALSO PROVIDES FOR VARIOUS REMEDIES, INCLUDING CIVIL PENALTIES FOR UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES. WHAT IS YOUR VIEW ON THESE PENALTIES? ONE WITNESS HAS CRITICIZED THE BILL IN THAT IT RESTRICTS PROHIBITED PRACTICES TO DISCRIMINATION IN HIRING AND RECRUITING AND DOES NOT COVER DISCRIMINATION REGARDING PAY, JOB ASSIGNMENTS, PROMOTIONS, TERMINATIONS, ETC. SINCE THESE OTHER PRACTICES ARE CURRENTLY PROHIBITED BY TITLE VII, SHOULD THIS BILL BE EXTENDED TO ALSO COVER THEM?

- H.R. 3080 PROVIDES DIFFERENT LEVELS OF PENALTIES FOR: HIRING UNDOCUMENTED ALIENS, VIOLATING THE PAPERWORK/VERIFICATION REQUIREMENTS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES. SHOULD THESE PENALTIES BE IDENTICAL TO ENCOURAGE (COERCE) PROPER CONDUCT ON THE PART OF EMPLOYERS? ALTERNATIVELY, WILL THE DIFFERENT LEVELS OF PENALTIES FOR THESE PROHIBITED ACTIVITIES CREATE ANY PROBLEMS?
- WILL THE FRANK AMENDMENT INTERFERE WITH ANY EXISTING COOPERATIVE ARRANGEMENTS BETWEEN EEOC AND STATE ANTI-DISCRIMINATION AGENCIES, PARTICULARLY WITH REGARD TO NATIONAL ORIGIN DISCRIMINATION COMPLAINTS?
- ARE THE MAJORITY OF EMPLOYMENT DISCRIMINATION COMPLAINTS NOW HEARD UNDER FEDERAL LAW OR STATE LAW? HOW RESPONSIVE HAVE STATE LEGISLATURES BEEN TO EMPLOYMENT DISCRIMINATION PROBLEMS? IF THE FRANK AMENDMENT WERE DELETED, WOULD THE STATES HAVE THE CONSTITUTIONAL POWER TO OUTLAW DISCRIMINATION BASED ON ALIENAGE? WHO HAS BEEN MORE IN THE FOREFRONT OF ANTI-DISCRIMINATION LEGISLATION, THE FEDERAL GOVERNMENT OR THE STATES?
- IN YOUR OPINION, COULD AN ENFORCEMENT MECHANISM FOR AN UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICE BE INCORPORATED INTO ALREADY EXISTING AGENCIES, RATHER THAN CREATING A SEPARATE ENFORCEMENT OFFICE?
- UNDER CURRENT LAW, WHAT RECOURSE WOULD A U.S. CITIZEN DISCRIMINATED AGAINST ON THE BASIS OF ALIENAGE HAVE? UNDER H.R. 3080?
- IN YOUR OPINION, HOW MUCH OF A CASELOAD INCREASE COULD BE EXPECTED BY EXPANDING TITLE VII APPLICABILITY TO EMPLOYERS OF BETWEEN FOUR AND FOURTEEN EMPLOYEES?

- Under the bill, the right to file a charge with the Special Counsel is given to two classes of persons:

  (1) those individuals who have been directly affected by the discrimination; and (2) officers of the Immigration Service (p. 16, line 17).

  Under what circumstances would an INS officer file a discrimination complaint?
- Under the National Labor Relations Act, a person may not pursue his claim administratively if administrative enforcement officials have found the case non-meritorious. Under the bill, however, a person who has had his charge dismissed (or not pursued) by the Special Counsel can file a claim directly with an ALJ. Is there any precedent in existing administrative law for authorizing the filing of private party complaints directly with ALJ's? Would it make more sense to give a person whose claim has been dismissed a right to an administrative appeal of the dismissal, as is done under the National Labor Relations Act?
- Are orders of the Special Counsel self-executing or is judicial enforcement needed? Who would have the right to seek judicial enforcement, the Special Counsel? The aggrieved person? An INS officer? Is the bill clear in this regard?
- In his testimony, one witness claims that the requirement (p. 20, line 1) that Administrative Law Judges conduct hearings on the complaint within 5 days of the service of the complaint is "absolutely impossible". Do you agree?

Other Anti-Discrimination Provisions in H.R. 3080

- If the Frank amendment is retained, would it make any sense to retain the provision that gives The Civil Rights Commission monitoring responsibility regarding sanctions-related discrimination? Would it make more sense to transfer the Commission's reporting requirements to the Special Counsel?

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

1121 Vermont Avenue, N.W.
Washington, D.C. 20425

November 13, 1985

Honorable Romano L. Mazzoli
Chairman, Subcommittee on Immigration, Refugees,
and International Law
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Mazzoli:

This will respond to your letter of October 10, 1985, containing questions to supplement my October 9 testimony before your Subcommittee.

The reconstituted Commission on Civil Rights has not adopted a position on H.R. 3080 or on immigration reform generally. I therefore testified on October 9 before your Subcommittee on behalf of the Commission only to the extent that my remarks addressed the role of the Commission envisaged by H.R. 3080. I am similarly constrained in my answers to your supplemental questions, and, therefore, can answer only the following question on behalf of the Commission.

QUESTION: If the Frank Amendment is retained, would it make any sense to retain the provision that gives the Civil Rights Commission monitoring responsibility regarding sanctions-related discrimination? Would it make more sense to transfer the Commission's reporting requirements to the Special Counsel?

ANSWER: If the Frank Amendment is retained, the monitoring, investigatory, and reporting responsibilities which H.R. 3080 assigns to the Commission should be assigned instead to the Special Counsel. As I pointed out in my testimony, the duties assigned to the Commission overlap with those assigned to the Special Counsel and the President. Both the Commission and the Special Counsel are given investigatory responsibilities, though the Special Counsel's duties in this regard are extensively described while the Commission's are not. Moreover, both the Commission and the President are directed to publish three reports at eighteen-month intervals, though the third report to be published by the Commission is due subsequent to its scheduled termination in September, 1989.

The vague language setting forth the Commission's monitoring, investigatory, and reporting functions may reasonably be read in such manner as to anticipate that these functions would overwhelm the Commission's limited resources. The direction that the Commission investigate allegations of sanctions-related discrimination, for example, could alone overwhelm the Commission. Must the Commission investigate anyone's allegations of discrimination, and, if so, how? It should be emphasized that the Commission's proposed FY 1986 budget is slightly more than $12 million and its employee ceiling numbers 236 full-time employees. The Commission is obviously small by agency standards, and its resources for FY 1986 are in large part committed.

Reassignment of the Commission's monitoring, investigatory, and reporting functions to the Special Counsel would not preclude the Commission from undertaking studies or holding hearings on the question whether sanctions discrimination has resulted, but it could then do so in a manner which would be appropriate given its budget limitations and traditional expertise.

SANCTIONS STRUCTURE AND DISCRIMINATION

QUESTION: Does the removal of criminal penalties for individual unlawful hirings in H.R. 3080 decrease the potential for employment discrimination?

ANSWER: It follows from the assumption that employer sanctions will give rise to discrimination that lessening the sanctions would lessen the potential for discrimination. Whether the assumption here is valid, though, is of course another matter.

QUESTION: Would decreasing the level of civil fines minimize the discrimination potential? Would you favor that?

ANSWER: Again, based on the assumption that sanctions, whether civil or criminal, would result in discrimination, it makes sense that lessening these penalties would lessen the potential for discrimination. With respect to the second part of your question, I have no position with respect to the advisability of sanctions.

QUESTION: What type of penalty structure -- civil or criminal -- would have the least potential for employment discrimination?

ANSWER: I do not know.

QUESTION: What is your view on the citation stage as an anti-discrimination provision?

ANSWER: I hold no view on this point.

VERIFICATION SYSTEM AND DISCRIMINATION

QUESTION: Doesn't the fact that there is a uniform verification procedure which must be followed for all prospective employees eliminate, or at least minimize, the discrimination potential?

ANSWER: Yes, particularly in view of the affirmative defense given to the employer who has complied in good faith with the verification requirements.

QUESTION: The Department of Justice testified that the verification procedure in H.R. 3080 is "simple," "straightforward," and "explicit," and that it is not necessary "that the employer be expert in detecting false documents," since H.R. 3080 provides that employer compliance is sufficient if the documents appear on their face to be genuine. What is your response?

ANSWER: I agree.

QUESTION: Aren't the verification procedures set out in such detail that a bona fide employer can comply without a great deal of inconvenience?

ANSWER: My understanding is that employers will not be inconvenienced inasmuch as they need only fill out a single sheet of paper no larger than the current W-4 form.

QUESTION: What specifically in the verification procedure would lead to greater discrimination than is now occurring?

ANSWER: Nothing to my knowledge.

QUESTION: H.R. 3080 provides a $1,000 civil penalty for failure to comply with the verification/paperwork requirements. Wouldn't this encourage employers to follow the verification procedures in a uniform fashion (i.e., ask all prospective employees) and won't such a fine minimize the opportunity for discrimination? Do you favor a fine for verification/paperwork violations?

ANSWER: The S. 1200 verification procedure appears to make more sense on this issue. Rather than mandate that employers of four or more employees keep paperwork for all prospective employees and impose civil penalties for failure to do so, the Senate bill would let the employer choose whether to keep the paperwork. But if an employer who doesn't keep the paperwork is later found to be employing an illegal alien, he or she is presumed to have "knowingly" hired that alien.

QUESTION: What is your response to the argument that employers have discriminated in anticipation of this legislation, and how do you view the education provision in this bill?

ANSWER: The education period should do much to eliminate any confusion that may arise with the passage of immigration legislation.

DISCRIMINATION POTENTIAL VS. DEMONSTRATED DISCRIMINATION

QUESTION: The Civil Rights legislation in the 60's was enacted in response to demonstrated and proven discriminatory activities. This legislation is an anticipatory response to discrimination that may flow from the enactment of legislation. Can you comment on these different legislative philosophies and approaches and are they necessarily inconsistent?

ANSWER: I concluded my October 9 testimony before your Subcommittee by noting that the creation of "a new cause of action based on alienage discrimination complete with a separate mechanism and the provision for attorney's fees would, absent a demonstrated need, be the wrong way to shape our national civil rights policy." "[A]bsent a demonstrated need" is the operative phrase. Never before have civil rights laws been enacted unless to remedy existing discrimination. The Frank Amendment is fundamentally flawed in that its inclusion of alienage discrimination is based on anticipation.

QUESTION: To what extent have cases of discrimination on the basis of alienage arisen?

ANSWER: The answer to this depends on what is meant by alienage discrimination. No cases of the sort contemplated by section 274B have been brought inasmuch as a statutory right of action does not yet exist. A line of cases does exist, however, which concern the differing issue of the right of lawful aliens to hold public jobs. These cases are constitutional rather than statutory, and the general rule here is that a court will apply strict scrutiny to a law excluding lawful aliens from jobs which do not involve a "political function."

QUESTION: Should Congress wait until discrimination occurs under a sanctions approach before enacting anti-discrimination provisions such as the Frank Amendment?

ANSWER: Absolutely. The Senate bill's approach to this question makes a good deal of sense. If the General Accounting Office finds a widespread practice of discrimination caused by employer sanctions, the sanctions could be terminated under a sunset provision. The cart has not been put before the horse, as is the case with the Frank Amendment.

QUESTION: Isn't it essential to include such provisions in a sanctions bill, particularly in view of the overwhelming fear of discrimination on the part of Hispanics and other ethnic groups?

ANSWER: It is my understanding that there may be a divergence of opinion on this issue between Hispanic organizations and the Hispanic population generally. In any event, the Senate bill's provision with respect to the termination of employer sanctions under a sunset provision in the event of a showing of discrimination is a good approach and ought to be an acceptable compromise.

QUESTION: Should there be a sunset on this anti-discrimination provision and mechanism (as has been recommended for sanctions) if alienage discrimination does not occur or the existing mechanism for addressing national origin discrimination proves to be adequate?

ANSWER: No. As my testimony and that of Paul Grossman made clear, the proper approach to the question of sanctions-related discrimination is already in place in the form of Title VII and the Equal Employment Opportunity Commission. If any discrimination results towards foreign-looking or foreign-sounding citizens, claims can be brought under the national origin clause.

QUESTION: Is the Frank Amendment redundant and unnecessary as suggested by the Department of Justice in its testimony?

ANSWER: Yes. The Frank Amendment would create a new enforcement mechanism when the EEOC is already in place, and it would create a cause of action already largely addressed by the national origin clause of Title VII. The redundancy would give rise to a host of problems which Paul Grossman and I pointed out in our testimony.

QUESTION: ...What is your response to deferring this issue [discrimination provisions] until a later time?

ANSWER: This has been answered above.

ALIENAGE/CITIZENSHIP DISCRIMINATION

QUESTION: Does the Civil Rights Act of 1866 (42 USC 1981) provide sufficient protection against employment discrimination by private employers based on national origin? On alienage?

ANSWER: It is not clear whether national origin discrimination is covered by section 1981. However, the Fifth Circuit in Guerra v. Manchester Terminal Corp. held that section 1981 does prohibit discrimination based on alienage.

QUESTION: ...Does Guerra provide any hope of relief for employment discrimination based on alienage that may result from this legislation? ...Shouldn't Congress address this matter specifically by legislation such as the Frank Amendment?

ANSWER: As noted above and in my testimony, Title VII provides adequate protection against the sort of discrimination that may occur if sanctions are enacted. In any event, the question of the appropriate remedy for sanctions-related discrimination should be discussed once sanctions are in place and the need for a remedy has been demonstrated.

QUESTION: To what extent are current discriminatory employment practices against Hispanics and other Ethnic groups based on national origin versus alienage/citizenship?

ANSWER: It is my belief that all discrimination against Hispanics and other Ethnic groups can be handled by the national origin clause. This suffices to answer your next question as well.

QUESTION: Would extending the coverage of national origin discrimination under Title VII to employers of between 3 and 15 employees respond to this particular problem? Should Congress respond to this particular problem? Should Congress respond in the context of Title VII amendments rather than through this type of special legislation?

ANSWER: Whether Title VII's ceiling ought to be lowered is obviously an option and a step you might take once it has been demonstrated that such an amendment is necessary. This consideration could take place after sanctions have been enacted and sufficient time has passed to ascertain whether discrimination at the four to fourteen employee level is a problem in need of a remedy. Very clearly, amendment of Title VII and the existing enforcement scheme under the EEOC would be far preferable to creation of a new agency with new procedures, a new body of law to develop, and new forums.

QUESTION: Does the Frank Amendment provide a preferred status to alienage/citizenship discrimination, since it creates a separate mechanism and procedures to deal with it? Does this mean that other forms of discrimination (i.e., based on race, religion) are less important?

ANSWER: The protections against alienage discrimination proposed by the Frank Amendment are undeniably greater than those presently afforded citizens discriminated against on the basis of sex, race, religion, or national origin. Such an arrangement would be contrary to the importance we give each of these forms of discrimination, and makes no sense from the standpoint of civil rights policy.

ANTI-DISCRIMINATION PROVISIONS

QUESTION: Would you comment on the workability of the mechanism that has been proposed for processing discrimination complaints under the Frank Amendment?

ANSWER: I agree with Paul Grossman's testimony in this regard and have nothing further to add.

QUESTION: What is your response to the Department of Justice's view that this mechanism is expensive and unnecessary?

ANSWER: I fully agree.

QUESTION: Should the proponents of this mechanism be required to carry the burden of proof that sanctions will result in discrimination?

ANSWER: Yes. And that burden of proof can only be met after sanctions have been in place for a sufficient amount of time.

QUESTION: The Department of Justice noted that "one thing that clearly is not needed is yet another separate bureaucratic apparatus charged with largely duplicative responsibility to investigate and prosecute parallel, if not overlapping, claims of employment discrimination." In essence, the Department of Justice recommends that Congress defer this issue at this time and instead await reports required under H.R. 3080 on the "actual enforcement experience" under the new law. What is your response?

ANSWER: I also testified to this effect, as did Paul Grossman. A new Office of Special Counsel is not needed. Title VII is sufficient to handle whatever increase in national origin complaints arises from employer sanctions. If need be, Title VII can be amended once experience has proven amendment necessary. With respect to the portion of your question dealing with reports, the Commission is directed by H.R. 3080 to publish three reports, with the final one due after the Commission is scheduled to go out of existence. You will want to amend the bill to address this, perhaps, as you suggest in your final question, by assigning the Commission's reporting functions to the Special Counsel, or, in the event that the Frank Amendment does not survive mark-up, by assigning the Commission's responsibilities to some other Department or Agency

TECHNICAL QUESTIONS

QUESTION: One witness criticized the bill in that it restricts prohibited practices to discrimination in hiring and recruiting and does not cover discrimination regarding pay, job assignments, promotions, terminations, etc. Since these other practices are currently prohibited by Title VII, should this bill be extended to cover them also?

ANSWER: The Frank Amendment ought to be struck from the bill. Assuming that it is not, it makes no sense to argue that the other terms and conditions of employment ought not to be added to the alienage cause of action because they are provided for in Title VII. The mechanism contemplated by the Frank Amendment is entirely separate from the mechanism under Title VII.

QUESTION: In your opinion, could an enforcement mechanism for an unfair immigration-related employment practice be incorporated into already existing agencies, rather than creating a separate enforcement office?

ANSWER: Yes. The EEOC already provides such an enforcement mechanism.

QUESTION: Under current law, what recourse would a U.S. citizen discriminated against on the basis of alienage have? Under H.R. 3080?

ANSWER: On the face of it, the question seems contradictory. By definition, a U.S. citizen could not be discriminated against on the basis of alienage (as opposed to national origin), unless, I suppose, there were some question as to whether he or she was a U.S. citizen.

QUESTION: In your opinion, how much of a caseload increase could be expected by expanding Title VII applicability to employers of between four and fourteen employees?

ANSWER: I do not know, which is why sanctions-related discrimination should not be addressed until after enactment of the sanctions.

I hope these answers will suffice to supplement my testimony of October 9. The relatively few questions which I did not answer were either duplicative or beyond the scope of my knowledge. Please let me know if I can be of further assistance.

Sincerely,

CLARENCE M. PENDLETON, JR.
Chairman

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICE OF
CONGRESSIONAL AFFAIRS

JAN 8 1986

Honorable Ramano L. Mazzoli
Chairman
Subcommittee on Immigration, Refugees
and International Law
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Chairman Mazzoli:

Enclosed are the Equal Employment Opportunity Commission's responses to several questions asked by your Subcommittee concerning the reform of immigration laws. We have responded only to those questions relevant to our jurisdiction and/or the laws we enforce.

We hope this information is helpful to you. Please let us know if we can be of further assistance.

Sincerely,

Phyllis Berry

Phyllis Berry
Director

__QUESTION__: The Civil Rights Legislation in the 60's was enacted in response to demonstrated and proven discriminatory activities. This legislation is an anticipatory response to discrimination that may flow from the enactment of legislation. Can you comment on these different legislative philosophies and approaches and are they necessarily inconsistent?

> __ANSWER__: The above described legislative philosophies are not necessarily inconsistent. The task of the legislature is perhaps more difficult, however, when it attempts to anticipate wrongful activity than when it reacts or responds to it. In the latter case, the legislature has evidence of what is occurring and can readily focus upon an appropriate response. In the former case, the legislature can only anticipate what may be necessary by careful analysis of perhaps conflicting views of constituent groups, or by assessing what has occurred or is occurring in analogous situations. Balanced against the difficulty of framing anticipatory legislation is the potential for heading off wrongful conduct or, at least, the potential for providing a remedy which otherwise would not exist.

__QUESTION__: To what extent have cases of discrimination on the basis of alienage arisen?

> __ANSWER__: If by "discrimination on the basis of alienage" is meant discrimination on the basis of citizenship, the issue has arisen infrequently. Title VII of the Civil Rights Act, which is enforced by the Commission, does not prohibit employment discrimination on account of citizenship. It does, however, prohibit employment discrimination on account of national origin. In cases where purported discrimination on account of citizenship is in reality discrimination on account of national origin, or where discrimination on account of citizenship has the effect of discriminating on the basis of national origin, it is actionable under Title VII. __Espinoza v. Farah Manufacturing Co__., 414 U.S. 811 (1973). Because Title VII does not __per se__ prohibit discrimination on account of alienage, charges alleging only alienage discrimination have been infrequent.

__QUESTION__: Should Congress wait until discrimination occurs under a sanctions approach before enacting anti-discrimination provisions such as the Frank Amendment?

ANSWER: As a general proposition, the Commission is not opposed to legislation which anticipates the discriminatory activity.

QUESTION: Isn't it essential to include such provisions in a sanctions bill, particularly in view of the overwhelming fear of discrimination on the part of Hispanics and other ethnic groups?

ANSWER: Insofar as Hispanics, or any other ethnic group, might be singled out by employers with regard to terms or conditions of employment, such conduct is already unlawful under Title VII. Title VII does not apply, generally, to employers with fewer than fifteen (15) employees. Many of those smaller employers are, however, covered by state and local laws which contain the same prohibitions against employment discrimination as does Title VII. Chairman Thomas in a statement submitted on October 9th before the House Subcommittee on Immigration and Refugee Policy stated that the legislation as proposed is duplicative of Title VII and unnecessary.

QUESTION: Should there be a sunset on this anti-discrimination provision and mechanism (as has been recommended for sanctions) if alienage discrimination does not occur or the existing mechanism for addressing national origin discrimination proves to be adequate?

ANSWER: As a general proposition, the Commission does not favor legislation which is, or becomes, unnecessary.

QUESTION: Is the Frank Amendment redundant and unnecessary as suggested by the Department of Justice in its testimony?

ANSWER: It is the Commission's view that existing law, Title VII, fully protects Hispanics, or any other ethnic group, from being singled out or accorded discriminatory treatment regarding terms or conditions of employment.

QUESTION: Does the Civil Rights Act of 1866 (42 USC 1981) provide sufficient protection against employment discrimination by private employers based on national origin? On alienage?

ANSWER: In McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976), the Supreme Court made clear that 42 U.S.C. subsection 1981 protects against employment discrimination on account of race, but did not address national origin or alienage. See also, Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). Lower courts have divided in answering the questions of whether section 1981 applies to claims of national origin and alienage discrimination. Thus, it cannot be said with any certainty that section 1981 provides sufficient" protection against employment discrimination in these latter two areas.

QUESTION: What is your reading of the Federal Circuit Court decision in Guerra v. Manchester Terminal Corp.? Does the Guerra Decision provide any hope of relief for employment discrimination based on alienage that may result from this legislation? In view of the uncertain nature as to whether this Circuit Court Decision will be followed in other Circuits (District Courts in New York and California have not followed it), shouldn't Congress address this matter specifically by legislation such as the Frank Amendment?

ANSWER: The Guerra decision held that employment discrimiation on account of alienage (lack of United States citizenship) by a private employer is prohibited under section 1981. The Guerra decision appears to provide hope for relief to persons alleging employment discrimination on account of alienage totally apart from any pending legislation. If Congress were to make employment discrimination on account of alienage illegal by passage of new legislation, that would, of course, insure a uniform implementation of Guerra. Since EEOC has no jurisdiction over claims raising purely alienage discrimination (as oppossed to claims of racial or national origin discrimination), the Commission has not formulated a position on whether Congress should legislate in this area.

QUESTION: The ABA notes in its testimony that the Federal Government should not follow "a different standard than that followed by states" with regard to making distinctions for employment purposes based on alienage. (The Supreme Court has consistently struck down overly broad state statutes that limit employment rights to U.S. citizens. State statutes have only been upheld when the state has satisfied its burden of demonstrating that a U.S. citizenship requirement for employment served a compelling state interest or an interest vital to a State's own political community.) What is your response?

ANSWER: In Hampton v. Wong, 426 U.S. 88 (1976), the Supreme Court stated that while the President and Congress possess the power to make citizenship a requirement for federal employment where the national interest is involved, the wholesale deprivation of employment opportunities to resident aliens violates the due process clause of the Fifth Amendment where it cannot be shown that the rule adversely affecting the liberty of aliens is actually intended to serve the national interest. The court acknowledged, however, the possibility of overriding national interests justifying selective federal action that would be unacceptable for an individual state.

QUESTION: Should private employers be prevented from establishing a hiring policy which prefers U.S. citizens over aliens who are entitled to work in this country? If a "citizen-preference" hiring policy is allowed, doesn't this run counter to the Federal mandate to all lawful aliens, including permanent resident aliens, refugees, asylees, and legalized aliens that they obtain employment in order to become self-sufficient?

ANSWER: As stated previously, United States citizenship requirements which have the purpose or effect of employment discrimination on account of national origin or race are currently prohibited by Title VII. With regard to claims of employment discrimination involving purely whether one is a United States citizen, however, EEOC has no Title VII jurisdiction. Accordingly, the Commission has not taken a position on whether private employers should be prevented from preferring United States citizens over aliens in cases where such a policy does not have the purpose or effect of discrimination on account of race or national origin.

QUESTION: The legislation provides for a private right of action for "pattern or practice" discrimination if the Special Counsel does not file a charge within 120 days after receiving it. What is your view of that provision? Are they similar to the procedures followed in current EEOC or NLRB cases? One witness indicates that Administrative Law Judges "do not have procedures geared to receiving complaints directly from lay individuals." Is this a serious problem and can such procedures be developed?

> **ANSWER**: As we read H.R. 3080, an individual has a private right to file a complaint with an administrative law judge if, at least 120 days earlier, they filed an administrative charge "which alleges knowing and intentional discriminatory activity or a pattern and practice of discriminatory activity." Under Title VII of the Civil Rights Act of 1964, an individual may elect to file a private law suit in federal district court provided that 180 days earlier they filed an administrative charge with EEOC. The individual can file suit even though EEOC has not concluded its investigation of the charge. Congress established this procedure so that charging parties could extricate themselves from the administrative process and move their claim to a different forum. We see no problem with a statutory scheme which permits charging parties to file their complaints directly with an Administrative Law Judge provided the Special Counsel has had the initial opportunity to process the charge.
>
> Under the three statutes EEOC administers, there are no provisions for administrative law judges.

QUESTION: H.R. 3080 also provides that any person filing an anti-discrimination charge "should be considered a full party to any complaint before an Administrative Law Judge respecting such practice and subsequently such appeal respecting that complaint." What is your comment on this provision and are any such rights accorded to charging parties before either EEOC or NLRB?

> **ANSWER**: Under Title VII, a charging party has a statutory right to intervene in a Commission law suit based on their charge. The case law has developed that when EEOC sues, that suit is brought on behalf of the broad public interest. EEOC does not stand in the shoes of the charging party when it files an enforcement action underlining the importance of the charging party's right of intervention. Based on the Title VII experience, we see no problem with according a charging party a similar right of intervention under H.R. 3080.

QUESTION: Will the Frank Amendment interfere with any existing cooperative arrangements between EEOC and State antidiscrimination agencies, particularly with regard to national origin discrimination complaints?

> ANSWER: Under H.R. 3080 potential problems could arise with state and local Fair Employment Agencies primarily in the area of deferring charges to the appropriate agency and initial determinations regarding which agency has jurisdiction over the charge. If an individual filed a charge with a state/local Fair Employment Agency and the charge was transferred to EEOC and the EEOC later determined that the charge more appropriately should have been filed with the Office of Special Counsel at the Department of Justice, what is the filing date with the Office of Special Counsel? Would the charge be considered timely filed with the Office of Special Counsel? We anticipate that a new set of comprehensive agreements and implementing instructions will have to be formulated between EEOC, state and local Fair Employment Agencies, and the Office of Special Counsel to address filing problems.

QUESTION: Are the majority of employment discrimination complaints now heard under Federal law or state law? How responsive have state legislatures been to employment discrimination problems? If the Frank amendment were deleted, would the states have the constitutional power to outlaw discrimination based on alienage? Who has been more in the forefront of anti-discrimination legislation, the federal government or the states?

> ANSWER: Nationally, 119,695 charges of employment discrimination were filed during FY-85, 39.8% with the state and local FEP agencies and 60.2% with EEOC. Based on the worksharing agreements between EEOC and the FEP Agencies, 4883 charges received by EEOC were deferred for FEP initial processing. This means that the 80 FEP Agencies were expected to initially process 43.9% of the combined FY-85 charge receipts.
>
> By and large, the states have been responsive to employment discrimination problems. A few states and local jurisdictions enacted equal employment opportunity laws prior to the Federal Civil Rights Act of 1964. However, the majority of states and local jurisdictions which have Fair Employment Agencies did so after Congress enacted the 1964 Civil Rights Act.

BEST COPY AVAILABLE

QUESTION: In your opinion, could an enforcement mechanism for an unfair immigration-related employment practice be incorporated into already existing agencies, rather than creating a separate enforcement office?

> ANSWER: Yes, we believe that employer distinctions based on citizenship or alienage already fall within the ambit of Title VII coverage and therefore are subject to EEOC review. Although Title VII does not make it unlawful for an employer to discriminate on the basis of an individual's citizenship, the Commission, in its guidelines on discrimination because of national origin, has concluded that discrimination against any individual because of a lack of citizenship, while not *per se* discrimination, may under certain circumstances, constitute unlawful discrimination because of national origin within the meaning of Title VII. Specifically, in those circumstances where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, the imposition of requirements would be prohibited by Title VII. (See 29 C.F.R. 1606.5 and in its compliance manual section 622, "Citizenship, Residency Requirements, Aliens and Undocumented Workers").

QUESTION: In your opinion, how much of a caseload increase could be expected by expanding Title VII applicability to employers of between four and fourteen employees?

> ANSWER: We believe lowering Title VII's jurisdictional threshold for numbers of employees most likely would result in a substantial increase in our workload.

QUESTION: Some critics of sanctions maintain that the confusion surrounding Congressional consideration of this legislation has already led to discrimination in some areas of the southwestern United States and that discrimination has already increased in anticipation of passage of this bill. In support of their criticism, it is maintained that employers don't understand the details of the legislation and their obligations under it. What is your response? Doesn't the lengthy education period in this bill minimize that possibility? Is the education period set forth in the bill sufficient and what recommendations would you have regarding the education of employers as to the nature of the sanctions and the verification procedure? Should this education period also include detailed information regarding the current state of the law on discrimination as well as the anti-discrimination protections that are ultimately included in this bill?

ANSWER: Under Chairman Thomas, EEOC has established an education program designed to inform employers and unions about their rights and responsibilities under federal fair employment laws. This initiative is termed the " Voluntary Assistance Program". Under the Voluntary Assistance Program, each of our district offices, every quarter, holds a one day symposium discussing discrimination principles and employer practices which seem to get employers in trouble. In FY-85, representatives from over 4,000 employers attended these sessions. We mention this program only to point out that the Civil Rights Act is now twenty years old and still scores of employers are unaware of their obligations and responsibilities under the Act that the Commission enforces. Therefore, while we believe an education period will help many employers understand their responsibilities, the message on verification procedures and the nature of sanctions will not reach many others.

City of Chicago
Harold Washington, Mayor

Office of the Mayor
Benjamin Reyes
Administrative Assistant
to the Mayor

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121 North LaSalle Street
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NOV 12 1985

November 6, 1985

Representative Romano L. Mazzoli
Chairperson
Subcommittee on Immigration
Refugees and International Law
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Mazzoli:

I appreciate the opportunity to provide greater details on the specifics of the position I presented for Mayor Harold Washington. It was a pleasure to present this testimony before the Joint Subcommittee on the issue of Immigration Reform.

If I can be of further assistance to you or your Committee, please do not hesitate to contact my office. Thank you for your attention.

Sincerely,

Benjamin Reyes
Administrative Assistant to
Mayor Washington

Encl.

SANCTIONS STRUCTURE AND DISCRIMINATION

As stated previously in my testimony, I oppose employer sanctions in any form. I believe that we will witness a greater increase in discrimination if sanctions are adopted based on the results of the current INS program in Chicago called "Operation Cooperation".

If it is inevitable that immigration reform legislation will contain employer sanctions, as indeed S. 1200 does, then I would urge implementation of adequate steps to protect those most likely to suffer from the resulting discrimination.

"Free First Bite" is not a concept that will prevent or reduce the discrimination that will occure as a result of Employer Sanctions. While such measures might reduce some of the burden immediately placed on employers by an unworkable provision for sanctions and no provisions for verification, it will not deter the employer from simply turning away any person who appears "foreign" and, thereby, potentially undocumented. With or without a "Free First Bite", Employer Sanctions will result in increased discrimination based on national origin and/or alienage.

VERIFICATION SYSTEM AND DISCRIMINATION

The provisions for a so-called "uniform" verification procedure are neither uniform in process nor antidiscriminatory. We are already witnessing in Chicago, by way of the INS "Operation Cooperation", that having a "system" of verification does not address discrimination. Only persons who appear or sound "foreign" are subjected to the verification process, and most often, if they are not white and sound or appear "foreign". For persons who are refugees and unlawful permanent residents, only INS can verify their status.

As documented in studies, governmental and private, as well as through INS admissions, the Immigration Service loses 1% of its case files every year. The system is inadequate and lethargic when it is able to respond, and costly for the job seeker who is a refugee or lawful permanent resident both in time and money spent for each verification application. Lost time waiting for INS to respond will mean lost job opportunities.

In fact, there does not exist a "uniform", "simple" or "straightforward" system of verification. The only way to provide what has previously been called a "secure" system would be national internal passports. To their credit, neither House of Congress has included such an unworkable and dangerous provision in this legislation. Placing the burden on the employer to determine what documents "appear on their face to be genuine" is likewise unworkable and dangerous. Experts on the matter, such as Senator Simpson, have made it very apparent that false documents are easy to come by and almost impossible to detect.

Experience has shown that employers, just like the Department of Justice - Immigration and Naturalization Service, are far more likely to question the status of those who are Hispanic or Asian because of their appearance (ie. not being white) than a person of European ancestry. In fact, the abuses have been so great by INS employees in the past that restraining orders have been issued by U.S. District Courts directed at such abuses. The INS has even deported U.S. citizens (and in some cases, minor children) despite their inability to verify status, simply because they looked and sounded "foreign". Trained personnel at INS, with a full agency of resources, are incapable of fair and accurate verification, yet this legislation would place expectations on private employers, untrained and without such resources, to do a job INS cannot.

A so-called "lengthy educational period" as your question implies will not minimize the possibility of discriminatory practices. Due to a fear of sanctions (civil or criminal), employers will play it safe in the most cost effective way possible. Rather than "playing it safe" and checking the status of all of their employees (a costly venture) they will simply not hire persons who, because of their appearance, may lead to problems and possible sanctions. Persons who are Hispanic or Asian are most likely to be turned away in many cases "just to be on the safe side."

DISCRIMINATION POTENTIAL VS. DEMONSTRATED DISCRIMINATION

Historically most, if not all, federal Civil Rights legislation has been reactive. Once it was demonstrated that "sufficient" numbers of people were suffering, and able to organize politically to stop that suffering, Congress has responded by passing legislation. All too often, however, this legislation has been too little, too late. Racism is too firmly entrenched to be legislated away. When institutions or laws encourage it, the roots are deeper and more pernicious. Ignoring such a potentially devastating outcome, as the increased institutionalization of discrimination represents, would be a costly mistake. In the 1960's Congress took action to pass Civil Rights legislation that had been pending for many years and needed for many more than that. Only after riots and bloodshed in the streets of our cities did this action occur. There is always a tremendous cost for ignoring the suffering of others. Are we willing to pay such a price later for institutionalizing yet another form of second class residents, for further subjugating persons of color? Or are you going to be proactive and prevent unnecessary suffering? That is really the question before us. Do we experiment with people's lives now and somehow attempt to make up for it later, or do we protect as fully as possible the rights of us all?

Congress must, if it is intent on creating employer sanctions, act now to guarantee some protection against discrimination and a means for redress when it occurs.

Providing a "sunset" for such protective measures is not desirable. These protections are necessary to prevent and to redress discriminatory practices. If you sunset the protections, you defeat their preventative purpose.

The Frank amendment is not redundant and it is necessary. Studies done by the ABA and others clearly conclude that there is currently no protection against alienage discrimination. This bill represents the first legislative attempt to address the need for differentiating between refugees, citizens and lawful permanent residents in the work place.

As stated several times, both in my testimony and these responses, "deferring the adoption of a separate nondiscriminatory provision..." would be a costly mistake. We already know from our experience that employer sanctions and verification systems result in discriminatory practices and unnecessary suffering for minorities. We are already informed.

ALIENAGE/CITIZENSHIP DISCRIMINATION

The Civil Rights Act of 1866 (42 USC 1981) does not provide sufficient protection against employment discrimination based on national origin, and provides no protection against alienage discrimination.

Private employers should be prevented from establishing a "citizen only" hiring practice. A person's immigration status should play no more a role in the hiring of a person than should the color of their skin; neither should it be a consideration. Employers should hire on the basis of qualifications for a position.

Should Congress establish a "citizen only" approach to hiring practices, those persons who are lawfully admitted to the U.S. would be hampered. Refugees, lawful permanent residents and others would suffer under "citizen only" practices just as they will suffer with sanctions in any form.

Providing protections only for those who have declared an intention of becoming U.S. citizens runs counter to our belief that pursuing naturalization is a free choice and one that is made because of a desire to become a citizen, not a choice to be made because of economic necessity. We will force people toward citizenship in order for them to have a job or be protected against abuse. Our freedoms, rights and protections must be extended to all whom we lawfully admit. Citizenship and the privileges and responsibilities that go with it, should be sought after by choice, not forced upon someone.

The Frank amendment does not provide a "preferred status" for alienage discrimination nor does it suggest that other forms of discrimination are less important. The Frank amendment does recognize the need for protection against alienage discrimination in light of the employer sanctions provision of this proposed legislation. Being a lawful resident in the U.S. (refugee, citizen, etc.) and thereby protected against alienage discrimination is a logical nexus.

ANTI-DISCRIMINATION MECHANISM

The establishment of a mechanism for redressing alienage discrimination is a necessary provision of this legislation as long as it has provisions for employer sanctions. If the Department of Justice views this mechanism as costly, they should advocate the removal of sanctions. It is a cost that goes with sanctions. Without such a mechanism we will see a much greater cost in human terms and, ultimately, this will be a need to redress the problems through the court system and in the chambers of Congress.

Proof of alienage discrimination does exist and has been presented before Congress by way of hearings and petitions. Establishing a mechanism for redressing such discrimination (alienage) is neither duplicative, parallel nor overlapping. The ABA and others have worked extensively at analyzing this problem and have addressed the matter in their testimony.

IMMIGRATION RESPONSES TO SENATOR SIMPSON'S QUESTIONS

BY
PAT CHOATE

ON BEHALF OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS

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1. You mention in your testimony that the EEOC relies initially on investigation and conciliation when dealing with a claim of discrimination, while H.R. 3080 would encourage a more adversarial, trial-like process. Why do you prefer the EEOC approach?

1. If an individual has a complaint based on Title VII violations and brings a complaint with the EEOC, an investigation is initially undertaken to determine if there is justification for the charges. The EEOC then recommends whether to drop the complaint or encourage conciliation -- a mutually acceptable resolution to the charges. There is considerable sharing of information at early stages in the proceedings. However, the Immigration Board proposed by H.R. 3080 more closely resembles the National Labor Relations Board, which is more adversarial in nature. In the case of alleged discrimination cases, both parties are bound to benefit from the investigation/conciliation approach of the EEOC.

2. Could you elaborate on your stated preference for the "Modified Sunset" provisions in S. 1200 as an anti-discrimination remedy, as opposed to those remedies in H.R. 3080? Why is a sunset preferable over new civil rights procedures?

2. S. 1200 takes a practical approach to any discriminatory backlash resulting from immigration reform. After three years, the Government Accounting Office would conduct a broad study of potential discrimination resulting against particular groups of people. The GAO would then report its findings to Congress, who could then determine whether the effects of employer sanctions are having broad discriminatory effects. If so, Congress could then decide to end the employer sanctions mandated in the immigration reform bill. The three-year period will provide ample time to assess the impact of such provisions after the business community has had time to adjust to their new police enforcement responsibilities. Furthermore, this will not create layers of new civil rights enforcement bureaucracies, but rather will be a test-pilot project to see if employer sanctions cause the business community to even-handedly screen out illegal aliens from the workforce.

H.R. 3080, on the other hand, would set up a complex and costly national agency to prosecute one type of discrimination -- alienage discrimination. A bureaucratic agency would be established with regional offices around the country. The agency would be charged with prosecuting businesses who did not comply with paperwork requirements, as well as those companies who discriminated against non-U.S. citizens. The rights of the aliens would be temporary, that is, if they did not take affirmative steps to become U.S. citizens within the six-month period after they became eligible, they lose their status to sue. This would put employers in the never-ending position of checking the status of workers, as well as dealing with several civil rights agencies. Furthermore, the Special Counsel would have entirely different procedures than the EEOC. This entire bureaucracy would be created in essence for those illegal aliens now living here who would be given amnesty under the bill so that they could become U.S. citizens. The bureaucracy would basically have no additional duties which could not be handled under "national origin" claims with the EEOC. It is simply not necessary.

ANSWERS TO QUESTIONS ON IMMIGRATION REFORM

BY PAT CHOATE
DIRECTOR OF POLICY ANALYSIS
TRW

ON BEHALF OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS

SANCTIONS STRUCTURE AND DISCRIMINATION

a. We believe that criminal penalties are excessive to ensure compliance with the law. Civil penalties under both the House and Senate bills this year are much harsher than last year's bills. Furthermore, we believe it would be particularly difficult to determine who should be held responsible for criminal liability in an employment situation.

b. We believe the civil penalties are perhaps so onerous -- even for first-time offenders -- to create an overreaction by employers. We believe the House version's penalty structure last year was much more rational. It provided for a citation for the first offense, a $1,000 fine for the second offense, and $2,000 for additional offenses. Since the employer community will be shouldering an entirely new police enforcement burden, it does not seem fair to fashion extremely harsh minimum penalties that may not be rationally related to the offense.

c. As noted, we think last year's penalty structure, as adopted by the House, would be a reasoned one, which would allow for employers to be informed of their new responsibilities and be fined in relation to their offense. The fines adopted by last year's House are not so weak as to be ineffective. After all, the fines are per offense. Thus, if a blatant violator has hired 100 illegal aliens, his/her fine for the second offense would be $100,000 -- hardly a mild penalty.

d. The "free first bite" concept of providing a citation for the first offense seems rooted in common sense. First, it acknowledges the difficulties in a nationwide education program to let the employer community know its responsibilities. We have no idea as to what extent discrimination could result from employer penalties, however, the more phased in the program, the less likely it is discrimination will result.

VERIFICATION SYSTEM AND DISCRIMINATION

a. NAM believes that any immigration reform bill should clearly define the nature and scope of a verification procedure, so that employers' can limit their liability. Employers should apply any verification system uniformly so as not to discriminate.

b. NAM believes the House provisions are specific enough that an employer need not be an expert in detecting false documents. We agree with the Justice Department.

c. The bill addresses with a good deal of specificity the types of documents employers can rely on to determine whether someone is qualified to work in the U.S.

d. The verification procedure is very detailed and straightforward. Our only concern is that the paperwork requirements could be onerous for smaller companies, who may not have personnel offices to handle the additional paperwork required under the bill.

e. We oppose a fine for failing to comply with the paperwork requirements. The purpose of the act is to discourage the hiring of illegal aliens. Fines for the intentional hiring of an illegal alien are already provided for in the bill. Since discrimination is most likely to occur prior to an individual being hired, the paperwork fine seems both unnecessary and unlikely to prevent discrimination.

f. NAM is not aware of increased discrimination in anticipation of a federal immigration reform bill. It is our understanding that the real problem is hiring illegal aliens, not discrimination in the Southwest. The bill provides for a six month education period, which will include the dissemination of forms and information to employers. In addition, the bill specifies that for the subsequent 12-month period to be a "safe" period for employers, whereby they will be issued a citation or warning for first violations. We believe this phase-in period is necessary and should serve as an educational process. We believe the more information provided during this period, involving compliance with all aspects of the legislation, the better the transition period will be. Certainly, dissemination should include information on potential discrimination which could ensue as a result of immigration reform.

DISCRIMINATION POTENTIAL VS. DEMONSTRATED DISCRIMINATION

a. As we previously noted, we believe the Senate approach to potential discrimination is much better. It provides a "window" to determine what the impact of this legislation will be. It is the NAM's position, however, that there is nothing wrong with U.S. companies giving job preferences to U.S. citizens if they so choose. This is done in countries around the world, and has nothing to do with discrimination based on national origin, religion, sex, race or age. By providing an amnesty program, many illegal aliens will have the opportunity to enter the mainstream and become U.S. citizens, accorded all the rights accompanying such a status.

b. It is our understanding that many companies have policies against hiring illegal aliens. To that extent, you could say there is discrimination based on alienage. Since the real issue of "alienage" would arise once the amnesty program began, the kinds of discrimination envisioned in the bill are nonexistent today. However, it is unfortunate that this bill would set up several tiers of status.

It would be very temporary -- that is if you didn't act to become a citizen within six months of becoming eligible you would lose your rights. Not only does this temporary status not make sense, it would put the employer in a very difficult spot in deciding who was legal and who was illegal -- who had status under the law to sue for discrimination and who did not.

c. The Congress is going to have to first grapple with the question of whether employers should have the right to give hiring priority to U.S. citizens. The U.S. Supreme Court has said it is permissible under current laws. The NAM believes that is a legitimate right of employers and serves as an incentive for noncitizens to move quickly toward becoming U.S. citizens. The benefits accruing to those who will be eligible for amnesty programs will be great. However, we believe it is unnecessary and ill-advised to give even greater protection under our discrimination laws to non-U.S. citizens than U.S. citizens. The current law prohibits discrimination based on national origin, a very broad anti-discrimination measure. We believe the Frank amendment would be ill-advised at any time. An amendment offered by Senator Kennedy is a much more reasoned approach to potential discrimination which may result from passage of this bill.

d. It is not essential to put such a measure in the bill. Hispanics and other ethnic groups are covered under Title VII of the Civil Rights, prohibiting national origin discrimination. The Senate-passed version of immigration reform provides for the GAO to review whether widespread discrimination against Hispanics and other ethnic groups results from the penalty provisions. If so, the Senate will review the report and decide whether to get rid of the penalty scheme. This seems much better policy than providing a temporary "alienage" status, which really only exists for six months, if the person does not take the proper steps to become a citizen. With high unemployment, U.S. employers should have the right to hire U.S. citizens, as long as they do not discriminate.

e. We do not believe the anti-discrimination measures outlined in the Frank amendment are appropriate -- period.

f. The Frank amendment creates several classes of U.S. citizens -- those covered by the Immigration Board if they have met the "alienage" requirements under the amnesty provisions, those here under special work permit programs, or those "temporary" citizens. Those people will have rights and remedies against any employer with more than three employees. U.S. citizens, on the other hand, would have remedies with the Equal Employment Opportunity Commission, which provides coverage against employers with more than 15 employees. Noncitizens can choose the most favorable forum, and will have broader rights. Furthermore, those "aliens" who do not avail themselves of the right to go through the citizenship process will lose their rights. This will put the employer in the unenviable position of constantly checking and rechecking identifications. The vast majority of cases which are bound to arise will be covered under Title VII, thus making the provision both unnecessary and redundant -- not to mention bad policy.

g. The Senate approach certainly is more reasoned. We agree with the Justice Department's assessment of getting more information before forging forward with a complicated, burdensome law that carves out a "floating" status under which a person can sue.

ALIENAGE/CITIZENSHIP DISCRIMINATION

a. The Civil Rights Act does prohibit employment discrimination based on national origin -- this is an extremely broad anti-discrimination measure, one afforded others based on sex, race, color or religion. Aliens have not been afforded equal employment discrimination protection. As previously noted, the NAM believes that as a public policy employers should be able to prefer to hire U.S. citizens if they choose. This is done in almost every country in the world, and, in fact, most countries are not as liberal as the U.S. in providing legal work opportunities. As a practical matter, we feel few people have been, or will be, denied opportunities to work where they have legitimate work permits.

b. The Frank amendment is not necessary. Aliens enjoy broad legal coverage in the United States, but they are not guaranteed all the rights afforded U.S. citizens. There should be a premium placed on citizenship, which is accompanied with rights to vote and have equal status in the workplace. The current law, NAM believes, does not prohibit employers from choosing U.S. citizens over non-citizens.

c. There is nothing that prohibits states from passing more comprehensive civil rights laws than those in the federal government today. That does not mean the federal government must follow the direction of a few states. As to the Supreme Court striking down overly broad state statutes that limit employment rights to U.S. citizens, we are in full agreement. The NAM is not asking for a law that would prohibit an employer from only hiring a U.S. citizen. Rather, we believe employers should be able to give preference to U.S. citizens if they choose. We do not anticipate such a trend, except in industries where the federal government already places restrictions on citizenship status, such as in the defense industry.

d. No, employers should not be prevented from having a hiring preference for aliens who are entitled to work in this country. As we noted in our testimony, the times it is most likely such a preference will occur is in the defense industry, where government's own regulations prohibit the hiring of non-U.S. citizens. It is our belief that this will not impede lawful aliens, permanent resident aliens, refugees, asylees and legalized aliens from obtaining employment. It is probably more important for the government to more closely assess the employment needs in this country and only provide work permits when jobs are available.

e. As noted, our policy is that we should not carve out a new form of discrimination based on alienage.

f. NAM anticipates there will not be wholesale discrimination against non-U.S. citizens. Thus citizenship status will not become a factor, absent someone being an illegal alien. In times of high unemployment, however, citizenship may indeed have greater significance.

g. The EEOC would be better equipped to discuss the extent of national origin discrimination. However, in discussions with industry leaders the only type of alienage discrimination we hear about has to do with complying with government regulations.

h. NAM is not aware of citizenship discrimination, as noted, except where the government regulations mandate a requirement of citizenship. NAM is supporting immigration reform because we believe it will help diminish the growing numbers of illegal aliens in the country. We are not anticipating a discriminatory backlash, but believe it would be ill-advised to anticipate one before analyzing the effects of such a bill.

i. We should not carve out a special provision for those in the "national origin" category. Coverage under Title VII should be uniformly applied based on race, sex, color, religion and national origin. We believe that providing coverage for employers with more than 15 employees is good policy and should not be extended to employers with fewer employees. It would be a costly waste of manpower and would single out a particular type of discrimination for special treatment.

j. The Frank amendment does indeed give preferred status to alienage/citizenship status. A whole new enforcement scheme -- both at the regional and federal level -- would be created to enforce this new type of discrimination. It would be both costly and unnecessary. The EEOC should retain enforcement authority of national origin claims. Providing a separate mechanism for this new discrimination status elevates non-U.S. citizens to a higher status, whereby they have two forums from which to choose from in claiming discrimination. Furthermore, those who fit under the "alienage" definition can sue employers with more than three employees, whereas under national origin the employer must have 15 employees.

k. It is our position that national origin discrimination is sufficient to protect a wide class of individuals.

l. We have not addressed the H-2 workers issue.

ANTI-DISCRIMINATION MECHANISM

a. The creation of a new Immigration Board, with regional offices, would be costly, burdensome and unnecessary. Claims of discrimination should continue to be funneled through the Equal Employment Opportunity Commission. Furthermore, the process through the Justice Department is much more like procedures under the National Labor Relations Board, rather than through EEOC. That is, the procedure is much less conciliatory in nature. In addition, an employer would have to face two different types of processes, in two very different agencies, for discrimination claims -- all of which should be handled the same. During the past decade, government has worked toward eliminating agencies with overlapping civil rights enforcement power and providing consistency in enforcement. The creation of an Immigration Board is definitely a step backward in this area.

b. There is no question that the system would be costly and unnecessary. A whole new investigative system would be created in the regions and a new bureaucracy created at the federal level. Why? The EEOC is already constituted in offices around the country and is staffed with experts in the discrimination area.

c. The NAM agreed to participate in the immigration reform efforts by screening employment applicants to ensure they have the right to work here legally. NAM is willing to support reasonable employer penalties for those who hire illegal workers. However, there does not appear to be any intent to discriminate in taking on these burdens. National origin protection under Title VII of the Civil Rights Act will protect U.S. citizens from discrimination. The Senate has taken a much more reasoned approach to the potential discrimination problem. It provides for reviewing the effect of employer penalties after three years, then deciding if they have had a discriminatory effect. It does not make sense to create this complicated civil rights enforcement agency, when it seems unlikely there will be wholesale discrimination trends warranting such an expensive and burdensome bureaucracy.

d. We agree with the Justice Department.

TECHNICAL QUESTIONS

a. NAM opposes creating a private right of action to bring discrimination suits before an Administrative Law Judge. In a case before the EEOC, an interested party must be named in the charge -- whether it is an individual complaint or a class action. The charge is either dismissed by the EEOC, or the EEOC files a complaint in court on behalf of the party(ies). A charge will be dismissed if the party does not have standing to sue. The NLRB process is different. However, in no instance is a party entitled to file directly with the administrative law judges. The reason is that the bulk of cases filed with the NLRB or EEOC do not have merit. The administrative law judges would not have the resources to investigate, as an appeal process, the legitimacy of claims. If you allowed such a direct appeal, the courts would be clogged and backlogs would occur. Furthermore, it would be very costly to go through the process for both parties, often unfairly.

b. NAM's position is that a new discriminatory scheme should not be created. However, it certainly should not be more expansive than rights afforded U.S. citizens under Title VII and through the EEOC. We believe only interested parties should be entitled to sue for any discrimination claim. Companies could find themselves facing costly suits filed by non-interested parties, which have no merit.

c. It is our position that there are broad enough remedies for persons discriminated against based on national origin and such remedies outline in H.R. 3080 are unnecessary. There are many inconsistencies with this bill and Title VII. That is why anti-discrimination measures should remain under the Title VII framework, providing consistency in coverage and scope.

d. NAM believes the Senate bill, providing only for penalties for knowingly hiring illegal aliens, is the better approach. Those employers, who through inadvertance, fail to keep paperwork should not be penalized. The purpose of this bill is not to get employers to comply with paperwork burdens, but to encourage them not to hire illegal aliens.

e. NAM believes the Frank amendment will create yet another competing civil rights enforcement agency to do what current agencies -- state and federal -- are equipped to do. Since the procedures will be different and the enforcement mechanisms varied, confusion and overlapping is bound to ensue.

f. The bulk of employment discrimination complaints are brought by the private bar in both state and federal courts. The state legislatures have become more and more active in the employment discrimination area in recent years, often passing more onerous legislation than that in the federal government. The states could probably pass legislation encompassing alienage discrimination if they chose.

g. The EEOC already is equipped to handle immigration-related discrimination charges, if they relate to issues under the national origin category.

h. A U.S. citizen could probably bring a discrimination suit based on national origin with the EEOC if he/she were passed over for a job based on discrimination in favor of an alien, under both current law and H.R. 3080.

i. NAM has no statistics, or predictions, on the impact of expanding Title VII to four or more employees. However, it seems an unnecessary waste of resources to focus on the "mom and pop" companies. Furthermore, these small companies will have a much harder time complying with paperwork burdens and facing legal suits, which may or may not have any legitimacy.

j. The INS is understaffed and overworked now. They should not be given the added responsibilities of being a discrimination watchdog.

k. Certainly, a party whose charge has been dismissed should not be able to file directly with the ALJ. An appeals process must be undertaken both through NLRB and EEOC, which is where NAM believes national origin discrimination claims should remain.

l. The bill is not clear as to who would enforce an order of the special counsel. As we have repeatedly noted, we do not believe a special counsel should be created. Certainly an aggrieved person or the INS should not have the right to enforce any order.

m. It is absolutely impossible for an administrative law judge to conduct hearings within five days of the service of the complaint. This would be particularly true if any individual could directly file complaints with the ALJ when unhappy with the special counsel's disposition.

OTHER ANTI-DISCRIMINATION PROVISIONS IN H.R. 3080

a. Since we do not support the creation of a special counsel within the Justice Department, we could hardly recommend that the special counsel be charged with monitoring sanctions-related discrimination. Furthermore, we would assume that national origin discrimination claims would still be made through EEOC, which the special counsel would not have knowledge about in reporting the effects of immigration reform.

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January 7, 1986

Mr. Skip Endress
Subcommittee on Immigration, Refugees,
and International Law
Committee on the Judiciary
2137 Rayburn Bldg.
Staffroom D

Dear Mr. Endress:

Enclosed please find copies of two letters from Arthur Flemming to the Hon. Romano L. Mazzoli and Richard W. Day responding to the latter's questions concerning anti-discrimination issues arising in connection with the Simpson-Mazzoli bill.

Sincerely,

Terri A. Steinhaus

Terri A. Steinhaus

Attachment

ARTHUR S. FLEMMING

1201 16th Street, N. W.
Washington, D. C. 20036
January 6, 1986

Honorable Romano L. Mazzoli
Chairman
Subcommittee on Immigration, Refugees,
and International Law
Committee on the Judiciary
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

In response to your letter of October 10, 1985, I have answered below your additional questions concerning anti-discrimination issues.

QUESTIONS: Arthur Flemming

1. You focused on the question of employer sanctions and their possible discriminatory effect when you were Chairman of the U. S. Civil Rights Commission. Your Commission's publication, The Tarnished Golden Door, contained many conclusions which I disagreed with--particularly the conclusion that discrimination against "citizens and legal residents who are racially and/or culturally identifiable with major undocumented immigrant groups" would result. Nonetheless, this is national origin discrimination. Alienage discrimination was never mentioned in that publication. Why do you believe it would be a problem now? What changes in employer sanctions proposals since the date of this publication--September of 1980--have caused your new concern about alienage?

   ANSWER: I disagree with your conclusion that "discrimination against 'citizens and legal residents who are racially and/or culturally identifiable with major undocumented immigrant groups'" can be categorized exclusively as national origin discrimination. Because "alienage/citizenship" and "national origin" are not mutually exclusive categories, often it cannot be ascertained whether an individual has been discriminated against because of his national origin, alienage or both. Accordingly, the discrimination referred to in The Tarnished Golden Door was not limited to national origin discrimination and my opinions today are consistent with those expressed in 1980.

2. You state in your testimony, on page eight, that employer sanctions "will result in some employers requiring job applicants to produce a passport or other proof of citizenship." You content that this could lead to a "citizens only: hiring policy. However, S.1200 specifically allows new green cards and appropriately endorsed foreign passports to be presented as preferred documentation, in addition to U. S. passports, certificates of citizenship, and certificates of naturalization. They are considered _equally_ appropriate. How would _this_ lead to alienage discrimination?

ANSWER: If employers adhere to the provisions set forth in S.1200, then the potential for citizenship discrimination would be greatly diminished. However, I believe that for many reasons employers will have an incentive to sidestep the requirements of S.1200 and, instead, play it safe or take the easy way out by requiring passports or other proof of citizenship, to wit:

a. _The Unknowledgeable Employer_. This is a person who has an indirect knowledge about employer sanctions for hiring undocumented aliens, but is ignorant of the specific provisions. This employer is likely to avoid running afoul of the law as he perceives it by playing it safe and favoring applicants not likely to be within the provisions of the law, _i.e._, non-Hispanic, and non-"foreign," (_i.e._, foreign looking or sounding persons) and documents most likely to be authentic, _e.g._, passports.

b. _The Wary Employer_. This is a person who is knowledgeable about the law and is wary of being caught in its net by not meeting the verification requirements which provide that an accepted document "reasonably appears on its face to be genuine." This person's hiring practices behavior will be similar to that of the unknowledgeable employer.

c. The Lazy Employer. This is a person who does not want to take the trouble to meet the compliance requirements of the law. He, too, will discriminate against Hispanics or "foreigners" because it is more likely that his verification and recordkeeping procedures will be subject to official scrutiny if he hires Hispanics or "foreigners."

d. The Bigot. This is a person who was inclined to discriminate before the passage of the Act and after the enactment of the law has greater reason to do so. He can in "good faith" reject tendered documents such as social security cards by stating that there is no way to determine their genuineness. Accordingly, like the Unknowledgeable Employer, he will require documents that are less likely to be forged, e.g., passports.

3. A later witness in this hearing (Paul Grossman) has indicated in his written testimony that it makes no sense to create a new anti-discrimination agency because its procedural issues will take many years to litigate. This was apparently the case with EEOC after it was first enacted. He also predicts extreme confusion for both defendants and litigants if two anti-discrimination agencies exist. Given these likely problems, why not propose to extend national origin coverage or add alienage to Title VII?

ANSWER: If Congress would agree to extend Title VII coverage to include alienage discrimination, I would gladly support its efforts. However, until this occurs, a scheme to respond to the discriminatory impact of employer sanctions is necessary. The mechanism proposed in H.E. 3080 appears to be efficient in that it utilizes already existing institutions such as the U.S. Immigration Board and administrative law judges; there is no indication that its procedural issues will take many years to litigate. Moreover, the responsibilities of the EEOC and the enforcement mechanism of H.R. 3080 are not duplicative: currently there is no uniform protection against alienage discrimination, nor is there protection against national origin discrimination perpetrated by employers of fewer than fifteen employees. Consequently, I do not believe that extreme confusion for both defendants and litigants will result if "two anti-discrimination agencies exist."

4. Congress has had two opportunities to alter the EEOC to conform to the structure represented in H.R. 3080 — in 1964 when the Civil Rights Act was first passed, and in 1972 when it was significantly amended. Congress rejected the Special Counsel, cease-and-desist order approach on both occasions. Why should we now allow such changes in through the "back door," on immigration reform legislation?

   ANSWER: H.R. 3080 proposes no changes to the current structure of the EEOC but rather creates a new mechanism wholly separate from the EEOC in response to new opportunities for discrimination created by the employer sanctions provisions of the bill. H.R. 3080 is an improvement on the EEOC approach and should be utilized in the immigration area. Consequently, I do not see how it can be contended that H.R. 3080 is pushing EEOC reform through the "back door."

Please contact me if I can be of any further help.

Sincerely,

Arthur S. Flemming
Chairman, Citizens Commission on
Civil Rights

ARTHUR S. FLEMMING

1201 - 16th St., N.W., #424
Washington, D.C. 20036

January 6, 1986

Mr. Richard W. Day
Chief Counsel
Subcommittee on Immigration
  and Refugee Policy
Judiciary Committee
SD 248
Washington, D.C. 20510

Dear Mr. Day:

In response to your letter of October 15, 1985, I have answered below Senator Simpson's additional questions concerning anti-discrimination issues.

SANCTIONS STRUCTURE AND DISCRIMINATION

1. Does the removal of criminal penalties for individual unlawful hirings in H.R. 3080 decrease the potential for employment discrimination?

ANSWER: Yes. I do not favor the imposition of sanctions, but assuming they remain in the bill, see Answer to #3.

2. Would decreasing the level of civil fines minimize the discrimination potential? Would you favor that?

ANSWER: I would favor decreasing the level of civil fines as it would minimize the potential for discrimination. See Answers to ##1, 3.

3. What type of penalty structure -- civil or criminal -- would have the least potential for employment discrimination?

ANSWER: As between civil or criminal, a civil penalty structure would have the least potential for employment discrimination in the hiring process. Criminal sanctions not only are more severe in and of themselves than are civil sanctions, but often criminal sanctions have ramifications beyond the actual imposition of the penalty itself, such as jeopardizing the employer's license or ability to bid on government contracts. Accordingly, an employer faced with the possibility of criminal sanctions will be more likely to behave in the manner described in my Answer to #8.

Consequently, while a criminal penalty structure may prove more effective in discouraging the hiring of undocumented aliens, the accompanying anti-discrimination provisions would have to provide a strong counterincentive to discourage discrimination.

I want to make it clear, however, that I am opposed to employer sanctions - civil or criminal.

4. Earlier House bills had always included a warning or citation for a first offense. This employer "free first bite" was designed to ensure conscientious employers they would not be subject to civil or criminal penalties before they became aware of the prohibition on hiring undocumented aliens. It was thought that an employer would not have to "play it safe" and this would then operate to minimize the potential for discrimination. What is your view on the citation stage as an anti-discrimination provision?

ANSWER: While it is unclear whether a "free first bite" would minimize the potential for discrimination, I do not think it would increase that potential. Indeed, it seems appropriate that any effective education program such as that discussed in my Answer to #10 should include a "free first bite" provision that would ensure conscientious employers that they would not be subject to civil or criminal penalties before they became familiar with the mechanics of the Act.

VERIFICATION SYSTEM AND DISCRIMINATION

5. Doesn't the fact that there is a uniform verification procedure which must be followed for all prospective employees eliminate, or at least minimize, the discrimination potential?

ANSWER: If S. 1200 provided for a uniform verification procedure to be applied to "all prospective employees" as stated in this question, then I believe that such a provision would minimize the potential for employment discrimination. (Of course, this requirement would place an overwhelming burden on the small employer who would not be equipped to maintain records for every person who applied to him for a job.) However, this question misstates the requirements set out in S. 1200 Sec. 113(b)(4). According to this Section, an employer would not be required to apply uniform verification procedures to all prospective employees, but rather only to those employees actually "hired, recruited, or referred." As a result the uniform verification procedure is likely to be ineffective because it will not document the procedures applied to an employer's applicant pool as a whole.

Additionally, a uniform verification procedure cannot discourage the behavior described in my Answer to #8.

This is so because the employers described in that answer will have a work force relatively free of Hispanics and "foreigners" (i.e., foreign looking or sounding persons) and thus would be less likely to come under the scrutiny of the INS for review of their verification systems.

Finally, it should be noted that a uniform verification procedure raises serious questions regarding an employee's right to privacy. Any time personal information is collected without proper safeguards this information can be shared among various agencies thereby abusing the limited purpose for which it was initially gathered.

6. The Justice Department, in its testimony, points out that the verification procedure in H.R. 3080 is "simple", "straightforward", and "explicit" and that it is not necessary "that the employer be expert in detecting false documents", since H.R. 3080 provides that employer compliance is sufficient if the documents appear on their face to be genuine. What is your response?

ANSWER: The Justice Department testimony does not accurately describe the verification provision of the bill. First, Sec. 274A(b)(1)(A) provides that employer compliance is sufficient if the documents "reasonably" appear on their faces to be genuine. This reasonableness test permits a violation to be found if the employer accepts a document as genuine while knowing that such documents are commonly expertly counterfeited. Additionally, it would impose a higher standard of detection on the sophisticated employer who often has occasion to examine such documents.

Moreover, the Justice Department testimony ignores the "good faith" test imposed by Sec. 274A(4). As with the reasonableness test, under the good faith test a violation could occur if the employer knows the documents of the kind he examines, which reasonably appear on their faces to be genuine, are commonly expertly forged. The good faith test, however, could impose an even higher burden on the employer because it potentially could be violated even when a document "reasonably appears on its face to be genuine" and the requirements of the reasonableness test are satisfied. For example, any extrinsic evidence that indicates that the employer knows his employee is an unauthorized alien notwithstanding the objectively and subjectively genuine appearance of the alien's documents would prove a violation of the good faith test. Accordingly, the verification procedure of H.R. 3080 is not "simple, straightforward and explicit."

7. Aren't the verification procedures set out in such detail that a bonafide employer can comply without a great deal of inconvenience?

ANSWER: No. See Answer to #6.

8. What specifically in the verification procedure would lead to greater discrimination than is now occurring?

ANSWER: I assume "discrimination that is now occurring" refers to the present employer who does not want to hire Hispanics or "foreigners" because of prejudice or fear of disruption to his workplace by INS raids.

The verification procedure in S. 1200 would increase the likelihood of discrimination among the unsophisticated or cautious employer and would give the present discriminatory employer additional means to discriminate, to wit:

a. The Unknowledgeable Employer. This is a person who has an indirect knowledge about employer sanctions for hiring undocumented aliens, but is ignorant of the specific provisions. This employer is likely to avoid running afoul of the law as he perceives it by playing it safe and favoring applicants not likely to be within the provisions of the law, i.e., non-Hispanic and non-"foreign."

b. The Wary Employer. This is a person who is knowledgeable about the law and is wary of being caught in its net by not meeting the verification requirements which provide that an accepted document "reasonably appears on its face to be genuine." This person's hiring practices behavior will be similar to that of the unknowledgeable employer.

c. The Lazy Employer. This is a person who does not want to take the trouble to meet the compliance requirements of the law. He, too, will discriminate against Hispanics or "foreigners" because it is more likely that his verification and record keeping procedures will be subject to official scrutiny if he hires Hispanics or foreigners.

d. The Bigot. This is a person who was inclined to discriminate before the passage of the Act, and after the enactment of the law has greater reason to do so. He can in "good faith" reject tendered documents such as social security cards by stating that there is no way to determine their genuineness.

9. H.R. 3080 provides a $1,000 civil penalty for failure to comply with the verification/paperwork requirements.

Wouldn't this encourage employers to follow the verification procedures in a uniform fashion (i.e., ask all prospective employees) and won't such a fine minimize the opportunity for discrimination? Do you favor a fine for verification/paperwork violations?

ANSWER: For the reasons noted in my Answer to #5, I do not favor sanctions for verification/paperwork violations because I do not believe that verification/paperwork requirements will effectively deter discrimination.

10. Some critics of sanctions maintain that the confusion surrounding Congressional consideration of this legislation has already led to discrimination in some areas of the southwestern United States and that discrimination has already increased in anticipation of passage of this bill. In support of their criticism, it is maintained that employers don't understand the details of the legislation and their obligations under it. What is your response? Doesn't the lengthy education period in this bill minimize that possibility? Is the education period set forth in the bill sufficient and what recommendations would you have regarding the education of employers as to the nature of the sanctions and the verification procedure? Should this education period also

include detailed information regarding the current state of the law on discrimination as well as the anti-discrimination protections that are ultimately included in this bill?

ANSWER: I agree that the many years of Congressional consideration of various versions of an immigration reform bill have confused both the public and the employers. Consequently, an effective education program is crucial. Your question incorrectly assumes that the bill mandates such an "education period." There is no tie between the education program described in Sec. 121(c)(2) and the one year grace period provided by Secs. 121(c)(3) and (4). Thus, there is no mandated period of time during which education proceeds.

Of course, I agree that the education program must include "detailed information regarding the current state of the law on discrimination as well as the anti-discrimination protections that are ultimately included in this bill." Unhappily, however, experience has shown us that no amount of distribution of "forms and information" about a complicated law such as S. 1200 can eliminate the problems described in my Answer to #8.

DISCRIMINATION POTENTIAL vs. DEMONSTRATED DISCRIMINATION

11. The Civil Rights legislation in the 60's was enacted in response to demonstrated and proven discriminatory activities. This legislation is an anticipatory response to discrimination that may flow from the enactment of legislation. Can you comment on these different legislative philosophies and approaches and are they necessarily inconsistent?

ANSWER: The history of our country, including discrimination against the Chinese railway workers in the West, Irish and Italians during earlier waves of immigration and Japanese-American residents during World War II, has never been free from discrimination against "foreigners." The characterization of the anti-discrimination provision of S. 1200 as "anticipatory" plainly ignores this history.

12. To what extent have cases of discrimination on the basis of alienage arisen?

ANSWER: It is difficult to gauge how many cases of alienage discrimination have arisen, although as I pointed out in my testimony, the case of Espinoza v. Farah Manuf.

Co., 414 U.S. 86 (1973), is an example of such a case. To the extent the bill encourages the use of U.S. passports as proof of a "right to work," there will be alienage discrimination. See Answer to #24.

13. Should Congress wait until discrimination occurs under a sanctions approach before enacting anti-discrimination provisions such as the Frank Amendment?

ANSWER: No.

14. Isn't it essential to include such provisions in a sanctions bill, particularly in view of the overwhelming fear of discrimination on the part of Hispanics and other ethnic groups?

ANSWER: Yes.

15. Should there be a sunset on this anti-discrimination provision and mechanism (as has been recommended for sanctions) if alienage discrimination does not occur or the existing mechanism for addressing national origin discrimination proves to be adequate?

ANSWER: The effectiveness of the anti-discrimination provisions of the Act should be evaluated periodically and changed if necessary. The anti-discrimination provisions, however, should be sunsetted only when and if the sanctions provisions are.

16. Is the Frank amendment redundant and unnecessary as suggested by the Department of Justice in its testimony?

ANSWER: No.

17. The Department of Justice, in its testimony, indicates that there is merit to the Senate approach

> of deferring for now the adoption of a separate nondiscrimination provision so as to allow for an informed evaluation of the need for such statutory language (and the shape it might take) on the basis of our experience with the employee-verification and employer-sanctions features of the current bill. In light of the proposed monitoring and reporting provisions of the bill, we can more realistically determine after enactment and a period of implementation whether there exists a real need for some sort of nondiscrimination provision.

What is your response to deferring this issue until a later time?

ANSWER: It should be noted that the "monitoring and reporting provisions" referred to by the Justice Department will not necessarily reveal discrimination. Experience with the EEOC and Title VII has shown that discrimination is most efficiently detected by a complaint mechanism of the kind provided for by the Frank Amendment. Consequently, the Justice Department's suggestion that no anti-discrimination provision be included in the act is wrong. To the extent that discrimination in the hiring of Hispanic and foreigners does not occur, the anti-discrimination remedies will not be employed. If there is discrimination, however, the anti-discrimination provisions will provide an immediate and accessible remedy. Moreover, the very existence of the anti-discrimination remedies coupled with an effective educational program will deter discrimination.

ALIENAGE/CITIZENSHIP DISCRIMINATION

18. Does the Civil Rights Act of 1866 (42 USC 1981) provide sufficient protection against employment discrimination by private employers based on national origin? On alienage?

ANSWER: No. It has not yet been determined by the United States Supreme Court whether 42 U.S.C. § 1981 extends its protections to aliens, nor do courts uniformally hold that the section protects against discrimination by private employers based on national origin.

19. What is your reading of the Federal Circuit Court decision in Guerra v. Manchester Terminal Corp.? Does the Guerra decision provide any hope of relief for employment discrimination based on alienage that may result from this legislation? In view of the uncertain nature as to whether this Circuit Court decision will be followed in other Circuits (District Courts in New York and California have not followed it), shouldn't Congress address this matter specifically by legislation such as the Frank amendment?

ANSWER: As noted in the question, some circuits have not followed Guerra and it is unknown whether its holding will be adopted by the Supreme Court or by those circuits that have not yet reached the question. Consequently, whether the protections of 42 U.S.C. § 1981 can be invoked to redress alienage discrimination is still unclear. Moreover, even if 42 U.S.C. § 1981 is uniformly extended to cover alienage discrimination, its provisions are still inadequate in that it provides no administrative remedy but rather forces the person discriminated against to pursue his cause of action through the more costly and complicated vehicle of the courts. Accordingly, "Congress [should] address this matter specifically by legislation such as the Frank amendment."

20. The ABA notes in its testimony that the Federal government should not follow "a different standard than that followed by states" with regard to making distinctions for employment purposes based on alienage. (The Supreme Court has consistently struck down overly broad state statutes that limit employment rights to U.S. citizens. State statutes have only been upheld when the state has satisfied its burden of demonstrating that a U.S. citizenship requirement for employment served a compelling state interest or an interest vital to a state's own political community.) What is your response?

ANSWER: The Frank Amendment would not affect state schemes regarding aliens that meet the "compelling state interest" test. Its provisions do not apply to "discrimination because of alienage which is otherwise required in order to comply with law."

21. Should private employers be prevented from establishing a hiring policy which prefers U.S. citizens over aliens who are entitled to work in this country? If a "citizen-preference" hiring policy is allowed, doesn't this run counter to the Federal mandate to all lawful aliens, including permanent resident aliens, refugees, asylees, and legalized aliens that they obtain employment in order to become self-sufficient?

ANSWER: Yes to both questions.

22. The Conference compromise last year provided protection from discrimination only for those aliens entitled to work in this country who have evidenced an intention to become U.S. citizens. Is this scope of coverage reasonable? Should aliens be required to be on the path to citizenship in order to have these anti-discrimination protections?

ANSWER: No to both questions. The requirement that an alien be "on the path to citizenship" in order to be protected from employment discrimination is unreasonable. This requirement would exempt from coverage the many legal aliens residing in the United States who have valid and understandable reasons for not seeking U.S. citizenship. For example, many aliens from war torn countries or countries suffering from totalitarian regimes would like to return to their countries when these problems are resolved. They see no need to pursue U.S. citizenship while they reside in the U.S. for the duration. Indeed, laws of their home countries might cause them to lose their home country's citizenship if they become citizens of the United States.

Constitutional protections have traditionally been extended to all persons in the United States regardless of citizenship; I see no reason to make the discrimination protections in this Act less broad.

23. The ABA, in its testimony, has stated that "the fact of U.S. citizenship or lack of U.S. citizenship should be an irrelevancy in the hiring process." What is your response?

ANSWER: I agree with the ABA statement.

24. To what extent are current discriminatory employment practices against Hispanics and other ethnic groups based on national origin versus alienage/citizenship?

ANSWER: It is difficult to determine because "alienage/citizenship" and "national origin" are not mutually exclusive categories and often it cannot be ascertained whether successful claimants were discriminated against because of national origin alone or national origin combined with alienage. What is clear, however, is that those claimants who cannot prove national origin discrimination are without remedy unless they are within the few jurisdictions that have interpreted 42 U.S.C. § 1981 to prohibit alienage discrimination.

25. One witness has indicated that "there is next to no citizenship discrimination, as opposed to national origin discrimination. The statute will not create any." What is your response?

ANSWER: _See_ Answer to #24.

26. Would extending the coverage of national origin discrimination under Title VII to employers of between 3 and 15 employees respond to this particular problem?

Should Congress respond in the context of Title VII amendments rather than through this type of special legislation?

ANSWER: I am in favor of extending Title VII coverage to employers of three or more employees. However, such extension would not address alienage discrimination. See Answer to #24. Moreover, it is unlikely that the present Congress will extend Title VII coverage to such employers.

27. Does the Frank amendment provide a preferred status to alienage/citizenship discrimination, since it creates a separate mechanism and procedures to deal with it. Does this mean that other forms of discrimination (i.e., based on race, religion) are less important?

ANSWER: The Frank Amendment does not provide a preferred status to "alienage/citizenship discrimination" since it also prohibits "national origin" discrimination. Moreover, the Frank Amendment does not give alienage/citizenship discrimination a preferred status; it merely provides a remedy for this discrimination where none previously existed.

28. Is there any logical nexus between filing a notice of intent to become a citizen and being protected against alienage discrimination? If not, what might be a more logical nexus?

ANSWER: No. See Answer to #22. The logical nexus should be that any person who can be legally hired under the Act (i.e., any lawful alien) should be afforded anti-discrimination protection.

29. Under current law governing H-2 workers, an alien may be admitted to do a temporary job if capable "persons" in the U.S. cannot be found for the job. This apparently gives permanent resident aliens as much right to the job as U.S. citizens. Has this equality of opportunity under H-2 placed H-2 employers in a difficult position with regard to deciding whether to hire a U.S. citizen or a lawful resident alien?

ANSWER: Employers are not in a difficult position in deciding whether to hire a lawful resident alien or a U.S. citizen as they are free to hire either. The H-2 program does not affect this decision.

ANTI-DISCRIMINATION MECHANISM

30. **Would you comment on the workability of the mechanism that has been proposed for processing discrimination complaints under the Frank amendment?**

ANSWER: The anti-discrimination complaint mechanism of the Frank Amendment appears workable. It is not unlike adjudicatory schemes in other federal agencies.

31. **What is your response to the Department of Justice's view that this mechanism is expensive and unnecessary?**

ANSWER: A scheme to respond to discrimination is necessary. See Answers to #8 and #17. The mechanism proposed by the Frank Amendment appears to be efficient in that it utilizes already existing institutions such as the U.S. Immigration Board and administrative law judges. While the Frank Amendment requires that these judges must be specially trained, such training can be given to existing ALJs. Additionally, because the statute only requires that these judges hear exclusively employment discrimination cases "to the extent practicable," they can be fully occupied with other immigration cases when there are insufficient employment discrimination cases to fill their dockets. Therefore, any expense of this mechanism is fully justified by its efficiency.

32. Should the proponents of this mechanism be required to carry the burden of proof that sanctions will result in discrimination? (In a related vein, the ABA has stated that "the burden of proof is on the proponents of such significant changes in our employment laws -- i.e., sanctions -- . . . and that the proponents of sanctions have failed to demonstrate that the implementation and enforcement of sanctions . . . will not result in discrimination against U.S. citizens or lawful immigrants authorized to work").

ANSWER: No. See Answer to #17.

33. The Department of Justice noted that "one thing that clearly is not needed is yet another separate bureaucratic apparatus charged with largely duplicative responsibility to investigate and prosecute parallel, if not overlapping, claims of employment discrimination." In essence, the Department of Justice recommends that Congress defer this issue at this time and instead await reports required under H.R. 3080 on the "actual enforcement experience" under the new law. What is your response?

ANSWER: The enforcement mechanism of the Frank Amendment is not "yet another separate bureaucratic apparatus." See Answer to #31. Moreover, the responsibility is not duplicative. There is no uniform protection against alienage discrimination, nor is there protection against national origin discimination perpetrated by employers of fewer than fifteen employees. See Answers to #18 and #19. There is no need to wait. See Answer to #17.

OTHER ANTI-DISCRIMINATION PROVISIONS IN H.R. 3080

34. If the Frank Amendment is retained, would it make any sense to retain the provision that gives The Civil Rights Commission monitoring responsibility regarding sanctions-related discrimination? Would it make more sense to transfer the Commission's reporting requirements to the Special Counsel?

ANSWER: The Civil Rights Commission's monitoring responsibilities should be transferred to the Special Counsel if the Act retains the Frank Amendment. It should be noted that S. 1200 requires the Commission on Civil Rights to report to the Congress when it finds that employer sanctions have "resulted in a pattern of discrimination in employment . . . on the basis of national origin." (Sec. 402(c)(2)(emphasis added)). The Frank Amendment prohibits alienage discrimination as well, and the Special Counsel's monitoring responsibilities should so reflect. The Act should require the Special Counsel to report the results of its monitoring to the Civil Rights Commission.

35. Under the bill, the right to file a charge with the Special Counsel is given to two classes of persons:

(1) those individuals who have been directly affected by the discrimination; and (2) officers of the Immigration Service (p. 16, line 17).

Under what circumstances would an INS officer file a discrimination complaint?

ANSWER: Given that an INS Officer deals frequently with non-citizens and employers of non-citizens, he will have ample opportunity to observe employment discrimination if such is occurring. He, therefore, would file discrimination complaints if he finds that the directly affected individual has not done so because of reasons such as unfamiliarity with the English language, fear of bureaucracy born of home country experiences or ignorance of the remedies available.

36. Under the National Labor Relations Act, a person may not pursue his claim administratively if administrative enforcement officials have found the case non-meritorious. Under the bill, however, a person who has had his charge dismissed (or not pursued) by the Special Counsel can file a claim directly with an ALJ. Is there any precedent in existing administrative law for authorizing the filing of private party complaints directly with ALJ's? Would it make more sense to give a

person whose claim has been dismissed a right to an administrative appeal of the dismissal, as is done under the National Labor Relations Act?

ANSWER: There is precedent authorizing the filing of private party complaints directly with judges. In the EEO Act, for example, a suit can be filed after the EEOC has found a complaint to be non-meritorious or after a complaint has been pending for a certain time. That scheme has been adopted by many state anti-discrimination laws. Direct access to a judge is a more effective remedy than an administrative appeal within the agency, particularly here, where the Frank Amendment provides an evidentiary hearing after the complaint is filed with the Board.

37. Are orders of the Special Counsel self-executing or is judicial enforcement needed? Who would have the right to seek judicial enforcement, the Special Counsel? The aggrieved person? An INS officer? Is the bill clear in this regard?

ANSWER: I have not found any provisions of H.R. 3080 providing for the issuance of orders by the Special Counsel.

38. In his testimony, one witness claims that the requirement (p. 20, line 1) that Administrative Law Judges conduct hearings on the complaint within 5 days of the service of the complaint is "absolutely impossible." Do you agree?

ANSWER: My reading of the requirement is that a Notice of Hearing must be issued within five days, but that the hearing may be conducted within a reasonable time thereafter.

39. H.R. 3080 provides different levels of penalties for: hiring undocumented aliens, violating the paperwork/verification requirements and unfair immigration-related employment practices. Should these penalties be identical to encourage (coerce) proper conduct on the part of employers? Alternatively, will the different levels of penalties for these prohibited activities create any problems?

ANSWER: I believe the levels of penalties in H.R. 3080 reflect the relative seriousness of the enumerated offenses. If penalties are included in the bill, I do not foresee any problems caused by varying their severity.

40. Will the Frank amendment interfere with any existing cooperative arrangements between EEOC and State anti-discrimination agencies, particularly with regard to national origin discrimination complaints?

ANSWER: No.

41. Are the majority of employment discrimination complaints now heard under federal law or state law? How responsive have state legislatures been to employment discrimination problems? If the Frank amendment were deleted, would the states have the constitutional power to outlaw discrimination based on alienage? Who has been more in the forefront of anti-discrimination legislation, the federal government or the states?

ANSWER: It is my belief that more discrimination complaints arise under federal law because of the protections afforded by Title VII and other federal anti-discrimination laws. That the states may constitutionally bar alienage discrimination is no indication that a nationwide ban would occur.

42. In your opinion, could an enforcement mechanism for an unfair immigration-related employment practice be

incorporated into already existing agencies, rather than creating a separate enforcement office?

ANSWER: Yes, such a route could be followed. However, for the reasons I have stated, it is far preferable to lodge the mechanism in the Special Counsel/Immigration Board scheme as provided in the Frank Amendment.

43. Under current law, what recourse would a U.S. citizen discriminated against on the basis of alienage have? Under H.R. 3080?

ANSWER: See Answer to #18. In addition, Title VII does not afford protection against alienage discrimination. Under H.R. 3080, a U.S. Citizen discriminated against on the basis of alienage would have the remedies therein set forth.

44. In your opinion, how much of a caseload increase would be expected by expanding Title VII applicability to employers of between four and fourteen employees?

ANSWER: I cannot estimate the actual caseload increase based on available data.

TECHNICAL QUESTIONS

45. The legislation provides for a private right of action for "pattern or practice" discrimination if the Special Counsel does not file a charge within 120 days after receiving it. What is your view of that provision? Are they similar to the procedures followed in current EEOC or NLRB cases? One witness indicates that Administrative Law Judges "do not have procedures geared to receiving complaints directly from lay individuals." Is this a serious problem and can such procedures be developed?

ANSWER: First, I must point out that a private right of action exists for a single instance of discrimination, not just for a "pattern or practice" as your question indicates. Second, See Answer to #36. Third, while complaints from lay people may read differently than those from the Special Counsel, the proceedings for investigating and resolving them should be the same.

46. H.R. 3080 also provides that any person filing an anti-discrimination charge "should be considered a full party to any complaint before an Administrative Law Judge respecting such practice and subsequently such appeal respecting that complaint." What is your comment on this

provision and are any such rights accorded to charging parties before either EEOC or NLRB?

ANSWER: The enforcement mechanisms of the EEOC and the NLRB, including provisions for becoming parties to complaints, reflect the particular needs of those agencies and differ from each other as well as from those proposed by H.R. 3080. To best enforce the anti-discrimination provision of H.R. 3080 I favor the provision to which this question refers.

47. H.R. 3080 also provides for various remedies, including civil penalties for unfair immigration-related employment practices. What is your view on these penalties? One witness has criticized the bill in that it restricts prohibited practices to discrimination in hiring and recruiting and does not cover discrimination regarding pay, job assignments, promotions, terminations, etc. Since these other practices are currently prohibited by Title VII, should this bill be extended to also cover them?

ANSWER: Assuming the bill retains employer sanctions, I have already discussed my view of the penalties in my Answer to #39. The anti-discrimination prohibitions of the bill are designed to counter the discrimination that may result from the employer sanctions which penalize the hiring of unauthorized aliens. Because there are no sanctions in this bill relating to pay, job assignment, promotion, termination, etc., the anti-discrimination provision should not reach those areas. It is not true, however, that Title VII currently prohibits such discrimination practices on the basis of alienage, nor does it prohibit those practices by employers of fewer than fifteen people.

Please contact me if I can be of any further help.

Sincerely yours,

Arthur S. Flemming
Chairman, Citizens Commission on
Civil Rights

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October 21, 1985

OUR FILE NO.

The Honorable Romano L. Mazzoli
Chairman
Subcommittee on Immigration, Refugees,
  and International Law
Committee on the Judiciary
Washington, D.C. 20515

Re: Testimony Before House Subcommittee on Immigration, Refugees, and International Law and Senate Subcommittee on Immigration and Refugee Policy - Response to Follow-up Questions

Dear Mr. Mazzoli:

I am glad my testimony was helpful. Set forth below, in the order in which they are written, are responses to your written questions:

Sanctions Structure and Discrimination

(1) Yes, the removal of criminal penalties for individual unlawful hirings in H.R. 3080 does decrease the potential for employment discrimination. However, if there is any increase in employment discrimination because of 3080, it will come about through ignorance rather than because of the structure of the bill. If anything occurs, it will simply be ignorant employers making a decision that rather than risk sanctions they will not hire anyone who seems "foreign." Any increase in discrimination will thus be national origin and not alienage discrimination.

(2) I do not believe that decreasing the level of civil fines would minimize the discrimination potential. Since any employer who in good faith checks papers is protected even should the papers prove fraudulent, any increase in discrimination will come about through ignorance and not because of the structure of the bill.

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(3) I do not think the penalty structure will affect whether or not there will be any increase in employment discrimination.

(4) Perhaps a "free first bite" would have some minimal effect on the bill's potential for increasing employment discrimination, but as noted above, I do not think employers who become conversant with the bill would have any incentive whatsoever to engage in employment discrimination. Perhaps if the "free first bite" was publicized, even ignorant employers would become aware of it, and would not feel constrained into avoiding the hiring of people who seem "foreign."

Verification System and Discrimination

(5) The fact that there is a uniform verification procedure probably will eliminate, and certainly will minimize, any potential for discrimination. Any employer conversant with the bill will have no incentive to discriminate. Only uninformed employers would feel pressured into staying away from "foreign" applicants.

(6) The Justice Department is correct in its statement that the verification procedure is simple and would protect any employer who checks documents. If there is any increase in discrimination, it will come from employers who are simply not conversant with the bill.

(7) The verification procedures are set out in detail and simple enough so that a bona fide employer can comply without a great deal of inconvenience.

(8) I do not think there is anything in the verification procedures that would lead to greater discrimination than is now occurring. If additional discrimination occurs, which is speculative but certainly possible, it will be because employers will have a general sense that "bad things" can happen if you "hire foreign people." Whether or not this will occur will depend upon the degree to which some employers remain ignorant of the fact that they are totally protected if they check papers.

(9) I do not think that a $1,000 civil penalty for failure to comply with the verification/paperwork requirements affects one way or another the likelihood of discrimination. Employers aware of the bill and aware of the fact that they are totally protected if they check papers would have no incentive to discrimination; employers not aware of the bill will not be aware of the civil penalty provisions either, and these would be the only employers who would refuse to hire those who seem "foreign."

(10) I am unaware of any discrimination caused by congressional consideration of the legislation. It is true that many employers do not understand the details of the legislation and their obligations under it. While the lengthy education period in the bill will minimize the possibility of misunderstandings, it is still possible that some employers will remain ignorant of the bill and will simply have a generalized feeling that one can "get in trouble" by hiring people who are "foreign." I do not know whether this would really happen, but analytically it is possible. The greater the education period the less likely there will be significant numbers of employers who remain ignorant. The potential for discrimination would be substantially minimized if there were an educational program emphasizing in a very simple fashion that employers violate the law if they reject people who seem "foreign," but are fully protected if they consider all applicants and merely check papers. Thus, the education period should include detailed information regarding the current state of the law in discrimination and the fact that it constitutes illegal national origin discrimination for employers of 15 or more (under Title VII) and for employers of all sizes, including less than 15 (under 42 U.S.C. § 1981), to refuse to consider for employment people who seem "foreign."[1]

Discrimination Potential vs. Demonstrated Discrimination

(11) Title VII was enacted in response to discrimination that everyone conceded existed. There is already a complete protection against national origin discrimination.

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[1] While there is an open issue as to whether § 1981 covers national origin as such (e.g., preference for someone of Norwegian national origin over someone of Finnish national origin), the overwhelming weight of authority is that it does cover national origin discrimination against persons whose appearance seems "different" (i.e., based on perceived color).

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National origin discrimination is prohibited by Title VII for employers of 15 or more employees, and is prohibited by 42 U.S.C. § 1981 (at least when based upon color) for all employers. If there is to be any increase in discrimination because of the immigration legislation, it would be national origin discrimination and not alienage discrimination, which is already prohibited by existing law. It is inconceivable that an employer would go to all the trouble of interviewing people, checking papers, and then reject persons who are legally entitled to work but are not citizens in favor of people who are legally entitled to work because they are citizens. It would be unprecedented to prohibit a form of discrimination, alienage discrimination, which most people believe is nothing other than theoretical now, and will not be caused by the bill.

(12) As I said in my live testimony, in 21 years of actively practicing labor law, I have never seen a case of alienage discrimination, as opposed to national origin discrimination, which is frequently encountered.

(13) Congress should clearly wait until a form of discrimination not now prohibited, alienage discrimination, actually occurs before enacting an anti-discrimination provision which creates a totally new federal agency in the Justice Department. If Title VII is amended in the manner described in my written testimony to prohibit alienage discrimination, it would seem to do no good, since there is no alienage discrimination, but would also do little harm, since there would be no cases. In short, there is absolutely no justification for an expensive new agency to combat discrimination which does not exist and probably will not exist, but little upside or downside to amending Title VII.

(14) I have no idea as to the political necessity to include anti-discrimination provisions in a sanctions bill because of fears on the part of Hispanics and other ethnic groups. If there is a political necessity to do something, since the discrimination that would result if there is any increase in discrimination would be national origin discrimination, a more appropriate and helpful response to Hispanics and other ethnic groups would be to increase the EEOC's funding for the initial year or two under the immigration legislation, with directions to the EEOC to report on whether the bill is causing an increase in national origin charges. If it does, the increase in funding could be made permanent.

(15) There should clearly be a sunset on any antidiscrimination provisions if they create an entirely new, expensive, confusing to charging parties and duplicative from the point of view of employers, agency. If Title VII is simply amended to prohibit alienage discrimination in the manner described in my paper, the amendment will have no real effect on anyone, since there is no alienage discrimination, and it will make little difference whether it remains on the books or not.

(16) The Frank amendment is redundant and unnecessary as suggested by the Department of Justice in its testimony. With respect to its stated purpose of increasing the national origin protection to cover employers with between four and 14 employees, it is redundant and unnecessary because 42 U.S.C. § 1981 already prohibits such discrimination when it is based upon perceived differences in color or appearance, which is what you are concerned about. (I do not believe you are concerned about a preference for people of French national origin over people of German national origin.) Most states prohibit national origin discrimination against smaller employees. (California prohibits national origin discrimination for employers of five or more.) Moreover, there is now no actual case of alienage discrimination, and any increase in discrimination caused by the new bill would be national origin and not alienage discrimination.

(17) Since I believe that it is an open question as to whether there will be any increase in discrimination, and that if there is an increase in discrimination it will be national origin and not alienage discrimination, of course I favor the Department of Justice approach to defer the adoption of a separate nondiscrimination provision until an analysis of what occurs indicates whether or not the bill is in fact causing any discrimination not prohibited by existing law.

Alienage/Citizenship Discrimination

(18) 42 U.S.C. § 1981 provides total protection against national origin discrimination insofar as the discrimination is based upon appearance or color. It thus covers employers of all sizes, including employers of less than 15 employees. It would provide total protection against any discrimination against those of Mexican ancestry.

(19) The Guerra case does specifically hold that § 1981 prohibits alienage discrimination. It is the only Circuit Court of Appeals decision on the issue. Nevertheless, I think the issue an open one. However, the important lesson to be learned from the Guerra case is that it has been with us for a decade, it provides a reasonable expectation that § 1981 would prohibit alienage discrimination, and yet there have been virtually no cases brought, indicating that in the real world alienage discrimination, as opposed to national origin discrimination, does not exist. In short, I believe it is an open question as to whether or not § 1981 prohibits alienage discrimination, but that there is no need for Congress to act because in the real world, pre- or post-Simpson-Mazzoli, alienage discrimination is not and will not be a major problem.

(20) I have no reaction one way or another to the ABA contention that the federal government should not follow a different standard than that followed by the states with respect to whether or not it is wise to prohibit alienage discrimination.

(21) My personal view is that it is improper to reject an individual who has a legal right to work in this country for employment for any reason that does not relate to the job and job relationships. I would personally have tremendous sympathy with anyone who is in this country and legally entitled to work who is rejected because, although on the road to citizenship, it has not yet been achieved. On the other hand, I am not prepared to say that people who prefer to hire American citizens, when jobs are scarce, are "evil." In short, I consider the "citizen-preference" issue debatable, and can see both sides of it. I think the point to be drawn from this is that one can argue both sides of whether or not alienage discrimination should be prohibited, unlike prohibitions of discrimination based on race, color, sex, etc., which discrimination is clearly evil beyond the possibility of debate. It thus makes no sense to create a totally new and separate federal agency for a debatable form of discrimination which may or may not exist, alienage discrimination, while leaving less debatable prohibitions against discrimination in the EEOC, the basic federal anti-discrimination agency.

(22) If there is to be a prohibition against alienage discrimination, I have no opinion on whether or not aliens should be required to be on the path to citizenship in order to have protection.

(23) My personal philosophy is in accord with the ABA position that "the fact of U.S. citizenship or lack of U.S. citizenship should be an irrelevancy in the hiring process." In my view, people legally entitled to work in this country should be judged on the basis of prospective job performance.

(24) There is substantial national origin discrimination which still exists. I believe if there is any alienage discrimination, as opposed to national origin discrimination, it is totally de minimis. As noted, in 21 years of practicing labor law, I have never seen a case of alienage discrimination, as opposed to national origin discrimination.

(25) The witness that indicated "there is next to no citizenship discrimination, as opposed to national origin discrimination, and that the statute will not create any" is me. Obviously I agree.

(26) As noted, § 1981 already prohibits the forms of national origin discrimination you are concerned about, and applies to employers of all sizes. It does require immediate redress in the federal courts, which as a practical matter requires a lawyer. When discrimination is practiced by employers covered by Title VII, no lawyer is required to file a charge with the EEOC. However, I suspect that a relatively low percentage of jobs exist with employers between three and 15 employees, and that in empirical terms the small employer problem is not a great one. If you deem it a great one, obviously you should amend Title VII to reduce the number of employees that are necessary for an employer to be covered as opposed to creating a totally new, duplicative and expensive federal agency. There is no magic to the 15-employee limit under Title VII. When Title VII was first passed it was a hundred employees. It was gradually reduced down to 25 and then to 15 employees. I see no great problems in reducing Title VII coverage still further. Many states, such as my own state of California (five employees), have lower numbers of employees required to cover an employer by the anti-discrimination legislation.

(27) The Frank amendment would provide a preferred status to alienage/citizenship discrimination. It creates a federal agency devoted to it. Moreover, it creates unprecedented procedures, with not only the NLRB system of a general counsel who, if the General Counsel finds discrimination,

will prosecute before an administrative law judge at federal expense, but, unlike the National Labor Relations Act, allows charging party access to administrative law judges even if the General Counsel concludes that no discrimination took place. Under the National Labor Relations Act, the general counsel's determination that there has been no discrimination is final, and a disappointed charging party has no right to proceed independently to an administrative law judge. I heard at the hearing some Congressmen supporting the Frank amendment contend that it is necessary because the EEOC has been ineffective. Although the EEOC has been ineffective, I view the argument as preposterous. Alienage discrimination, whether or not one agrees with my perception that it does not exist in the real world, is clearly less of a national problem than race, color, national origin, sex, and religious discrimination, to name a few. To contend that the EEOC is adequate for these forms of discrimination, but inadequate for the less important alienage discrimination, makes absolutely no sense.

(28) I have no strong views on whether there is a logical nexus between filing a notice of intent to become a citizen and being protected against alienage discrimination. My personal view is that anyone legally entitled to work in this country should be chosen or not chosen for a job unaffected by considerations that do not relate to their likelihood of performing the job well.

(29) I have no knowledge or opinion relating to any difficulties caused by "H-2 workers."

Anti-Discrimination Mechanism

(30) The Frank amendment's workability is nonexistent. It would be difficult to imagine a worse "Rube Goldberg" procedure for processing discrimination complaints. From the point of view of the charging party, for example, an Hispanic who is an intended citizen, who was rejected for employment and believes he has been the victim of discrimination, neither that individual nor his lawyer would know where to go. It might not be readily obvious where to go to protest national origin discrimination. The charging party might not know whether the employer employed 15 or more employees for 20 weeks. If the national origin charge is filed with the EEOC, it would end up being dismissed if the employer is not covered

by Title VII. If filed with the Justice Department, it must be dismissed if also filed with the EEOC, and would have to be dismissed if the employer is covered by Title VII. The charging party would not know whether he was the victim of alienage or national origin discrimination, and would want to protest both. In practice this would mean a national origin charge with the EEOC, a national origin charge with Justice, and an alienage charge with Justice. Both Justice Department investigators and EEOC investigators would have to investigate coverage. Normally one investigates coverage at the same time one investigates the merits. The charging party would be asked to cooperate in both duplicative investigations. If the issue of coverage is not clear, the charging party might have to proceed to both the federal courts and to an administrative law judge to protest national origin discrimination. If the employer is covered by Title VII, the charging party would have to proceed to the federal courts to protest national origin discrimination, and proceed to an administrative law judge to protest alienage discrimination. This would double the amount of time that would have to be spent by the charging party and the charging party's lawyer in protesting discrimination.

The employer's situation is at least as bad. The employer would have to defend itself before the EEOC, before a federal court, before Special Counsel, and before an administrative law judge. Moreover, there would seem to be no procedure for weeding out frivolous claims. Under Title VII, an employer can move for summary judgment. However, under the Frank bill, a charging party whose claim of discrimination is rejected by the special counsel could nevertheless go to an administrative law judge and insist on a full trial on the merits. Moreover, in addition to having to defend itself before the EEOC, a federal court under Title VII, the Special Counsel, and an administrative law judge, the employer could be sued under § 1981 for both national origin and alienage discrimination, and could have to defend itself before a state anti-discrimination agency where state law, as most state laws do, prohibits national origin discrimination. This multiplicity of forums is exactly contrary to the direction which the federal government has been trying to move, by consolidating all discrimination in the EEOC. This is totally contrary to the generally applauded move of the Carter Administration in transferring age and equal pay discrimination from the Department of Labor to the EEOC.

From the point of view of a taxpayer, concerned as all taxpayers should be about the national deficit, it of course verges on insanity to create an expensive and duplicative federal agency in the Justice Department to handle a single form of discrimination, while leaving all other forms of discrimination at the EEOC.

(31) In light of the above, I obviously agree with Justice's view that this mechanism is expensive and unnecessary.

(32) I disagree with the ABA view. I do not think that Congress should pass anti-discrimination legislation until it has been demonstrated with reasonable certainty that the bill will cause additional discrimination of a type (i.e., alienage as opposed to national origin) that is not remedied by existing law.

(33) I totally agree with the Department of Justice view that if there is one thing that is clear, we do not need a separate bureaucratic apparatus. I agree that we should wait and see whether the bill causes any discrimination not now remedied by existing law.

Technical Questions

(34) The provision for a private right of action for "pattern or practice" discrimination claims if the Special Counsel does not file a charge within 120 days is mind-boggling and unworkable. Under the National Labor Relations Act, only the General Counsel can proceed to a hearing before an administrative law judge, and she can proceed only on behalf of specified individuals who have filed charges. A charging party has absolutely no right to go to an administrative law judge. Under Title VII, only the EEOC can proceed on a pattern or practice type case in federal court without meeting the requirements of Rule 23 of the Federal Rules of Civil Procedure, which govern class action cases. An individual charging party who wishes to bring a case under Title VII in federal court must meet the detailed and rigorous requirements of Rule 23. Class actions are the most difficult types of cases to try, and the federal courts, interpreting Rule 23, have created an extremely detailed framework of rules which are necessary to protect the class and to protect defendants. There is no question but that administrative law judges have no procedures to handle class-type cases. This is separate

and apart from the fact that administrative law judges "do not have procedures geared to receiving complaints directly from lay individuals." This is an extremely serious problem. This is all the more reason why Title VII should be amended if there is to be a prohibition against alienage discrimination rather than creating a new agency. If there is to be a separate agency in the Justice Department, the NLRB procedures should be followed, and only the general counsel should have the right to proceed to an administrative law judge, which is the National Labor Relations Act procedure.

(35) With respect to charging parties being a full party in any proceeding before an administrative law judge or subsequent proceeding, under Title VII, if the EEOC decides to sue in federal court, the charging party may seek to intervene, which is routinely granted. Under the National Labor Relations Act, full-party status is not granted at the hearing, although normally the charging party may be represented and examine witnesses and file briefs. If there is to be alienage discrimination prohibition, Title VII procedures should be used. If there is to be a separate agency in the Justice Department, NLRB procedures should be used.

(36) There is no reason to have different remedies for alienage discrimination than are now provided by federal law for national origin, race, sex, etc., discrimination. I was the witness who, "with my Legal Aid hat on," criticized the Frank bill in that it prohibited hiring and recruiting discrimination but does not prohibit discrimination in pay, job assignments, promotions and termination. Obviously, if alienage discrimination is evil, it is just as evil to discriminate against aliens with respect to job assignments and pay as it is with respect to hiring. This is simply an illustration of the problems that happen when one tries to create an entirely new anti-discrimination structure, rather than simply amending the existing Title VII discrimination structure. If Title VII were amended, all forms of discrimination would be prohibited.

(37) There is no need for consistency of penalty for employment discrimination as opposed to, for example, hiring undocumented aliens. There should be a consistency of remedy under the various discrimination laws (i.e., there should not be an incentive to try to separately establish alienage and national origin discrimination

because one type of remedy is available under Title VII for national origin discrimination, and another type of remedy available for alienage discrimination).

(38) The Frank amendment will certainly interfere with existing cooperative arrangements between EEOC and state anti-discrimination agencies. The EEOC has elaborate arrangements. Justice would have to duplicate those arrangements. Moreover, state anti-discrimination agencies would never know which federal agency was handling national origin claims, since it would frequently not be clear whether a particular agricultural employer was covered by Title VII or not.

(39) In California, my state, a substantial number of employment discrimination complaints are heard under both federal law and state law. The California Legislature has been very responsive to employment discrimination problems. Some other state legislatures have not been so responsive. If the Frank amendment were deleted, I see no reason why the states would not have constitutional power to outlaw discrimination based on alienage. The federal government in no sense is purported to preempt the field. I think in general the federal government has been more in the forefront of anti-discrimination legislation than the states, although it varies state by state.

(40) Not only could an enforcement mechanism for an unfair immigration-related employment practice be incorporated into existing Title VII and EEOC procedures, but if there is to be a prohibition against alienage discrimination, this is clearly the preferred route to follow. It would be easier for charging parties to contest discrimination, less burdensome for employers to defend, and less expensive for the taxpayers if alienage discrimination were covered by Title VII rather than through a separate agency.

(41) Although in 21 years of practice I have never encountered a case of alienage discrimination, I have at least read three or four cases where employers had policies preferring U.S. citizens. I have never even read a case where an employer preferred non-U.S. citizens who were legally entitled to work in this country to U.S. citizens. If one wishes to get totally theoretical, a U.S. citizen discriminated against because of his citizenship would

have recourse only under § 1981. Presumabely H.R. 3080 would be interpreted to protect such an individual, as would a prohibition of alienage discrimination under Title VII.

(42) If Title VII applicability were extended to cover employers with between four and 14 employees, my rough estimate is that an additional 10% of jobs in the country would be covered, and a commensurate increase in caseload. My estimate is that a high percentage of additional employers would be covered, but a relatively low percentage of additional jobs. I do not see discrimination by small employers as comprising a significant percentage of existing discrimination. It is of course much more of a burden, relatively speaking, on a small employer to defend itself under Title VII than the burden on a large employer.

(43) I have no idea of the circumstances under which an INS officer would file a discrimination complaint.

(44) You are correct in your statement of National Labor Relations Act procedures. I am not generally an expert in administrative law, and will not purport to comment on non-labor law areas of administrative law. It clearly makes no sense to allow charging party access to administrative law judges. The NLRA procedures make much more sense if there is to be a totally separate anti-discrimination agency. For example, as I read the Frank amendment, even an obviously frivolous claim from a "crazy" (for example, "I am a citizen of Mars and have been discriminated against because I am a Martian") would have to be the subject of a full ALJ hearing. In other words, no matter how frivolous, a charging party has a right to a full hearing before an ALJ.

(45) As I read the bill, the Special Counsel has to present his case to an ALJ, who would render a decision. The loser would then have a right to review in the federal courts under the Administrative Procedure Act.

(46) I am the witness who stated that conducting a discrimination trial within five days of the service of the complaint is "absolutely impossible." Please remember that the complaint may be filed by a layperson and not the general counsel. It also could be a pattern or practice complaint. Discrimination cases are complex, frequently involve multiple witnesses, and turn on a judicial finding

of intent. In order to properly try a discrimination case, it is frequently important to present to the judge pattern or practice evidence, detailing how other persons have been treated. For example, if an Hispanic non-citizen alleged national origin and alienage discrimination, it would be extremely relevant to dig up the employer's hiring records for the past two or three years, to present to the judge the names of other Hispanics hired for similar jobs, to present to the judge the names of other non-citizens hired, all of which would be extremely material to determine whether the particular charging party had been discriminated against because of national origin or alienage. It takes time to dig through such records, which may or may not be in the locale where the trial is to be held. Witnesses may be unavailable. Moreover, the specific allegations (particularly if the complaint is filed by a lay individual) may be unclear. I know of no situation in labor law where an employer is obliged to defend itself on such short notice. Again, this is simply an additional reason why existing Title VII procedures should be used.

Other Anti-Discrimination Provisions in H.R. 3080

(47) I deem it inconceivable that the Frank amendment would be retained, since if there is to be a prohibition of alienage discrimination, it is clearly in the interest of protected parties, employers, and taxpayers to simply amend Title VII and not to create a totally new agency. If there is to be a prohibition against alienage discrimination, however, either through the Frank amendment or through Title VII, there is no reason for the Civil Rights Commission to be involved. Reporting requirements should be transferred either to the Special Counsel or to the EEOC, depending on whether or not Title VII is utilized or a totally separate structure created.

* * *

I hope the above proves of help.

Sincerely,

Paul Grossman

PG:el

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 17, 1985

Honorable Romano L. Mazzoli
Chairman, Subcommittee on Immigration,
Refugees, and International Law
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Mazzoli:

Thank you for the opportunity to appear before the joint hearing on Immigration Reform. As I stated in my testimony, immigration reform is an important priority of this Administration.

I have attached my answers to your questions. Since the questions were organized by headings my responses are organized in the same way. I have numbered all the questions and keyed my responses to those numbers. Where some questions ask for a response to the positions I took at the hearing I have, of course, not repeated my testimony.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Sanctions Structure and Discrimination

Questions 1-3. In our view the employee verification program, whether enforced civilly or criminally or both, will not increase employment discrimination. As I stated in my testimony, any employer who chooses to discriminate in response to the enactment of an employer sanction program will be confronted with existing federal and state prohibitions against national origin discrimination.

Under H.R. 3080, the employee verification system would be mandatory for all employers. Under S. 1200, an employer would be required to use the verification system only if ordered to do so as a penalty for hiring an alien ineligible for employment. Making employee verification mandatory for all employers would be an additional disincentive to discrimination; if the employer were required by law to verify all new hires, there would be no reason to refuse to consider members of any one class.

Question 4. I stated in my testimony that there is no evidence that the employee verification program will lead to discriminatory practices by employers. Accordingly, in my view the creation of a "free first bite" will have no effect one way or the other on the likelihood of this bill to create discrimination where none already exists.

Verification System and Discrimination

Questions 5-9. Most of the questions on this topic reflect an acceptance of the positions set out in my prepared testimony and ask for a response to those positions. For that reason I will respond only to the last question.

Question 10. Notwithstanding assertions by some critics of the employer sanctions provisions that some employers are already discriminating in anticipation of the bill, we know of no hard evidence of such discrimination yet being supplied to Congress. Since we remain confident that any such discrimination can be adequately reached under existing antidiscrimination laws, there is in our view no cause for including the proposed antidiscrimination provisions in this legislation.

We would have no objection to Congress' creation of some form of program to educate employers as to the requirements of the bill. The bill is not so complicated that employers will be unable to understand their obligations once it is enacted. H.R. 3080 states that no penalty may be ordered during the first six months the bill takes action, and that during the next year employers who violate the verification system or hire an alien who is ineligible for employment may receive only a citation for a first violation. This is a more than sufficient learning period.

We do not believe that it is necessary, or appropriate, to enact any new provisions requiring the government to educate employers on their nondiscrimination responsibilities. The Civil Rights Commission is already empowered to provide information about nondiscrimination laws and responsibilities. The statutory duties of the Commission include "study[ing] and collect[ing] information concerning legal developments constituting discrimination," 42 U.S.C. 1975c(a)(2), and "serv[ing] as a national clearinghouse for information in respect to discrimination." 42 U.S.C. 1975c(a)(4). The Equal Employment Opportunity Commission is empowered to "make such technical studies as are appropriate to effectuate the purposes and policies of [Title VII] and to make the results of such studies available to the public." 42 U.S.C. 2000e-4(g)(5). Accordingly, legislation already exists which allows the government to take necessary steps to educate employers on their nondiscrimination responsibilities. In addition, familiarity with the applicable nondiscrimination laws in this country, or any other laws applied to business entities, is the requirement of any entity which purports to do business here. The nondiscrimination provisions applicable to businesses have been in force for many years, and have become an ingrained part of business law.

Discrimination Potential vs. Demonstrated Discrimination

Questions 11-13. As the first question recognizes, the Civil Rights legislation which was enacted during the 1960s was a response to a well-recognized, wide-spread problem of invidious discrimination. No one can argue that the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act were "anticipatory responses." They were appropriate and necessary responses to decades of undeniable discrimination.

To the extent that national origin discrimination has been made a concern in this legislation, I stated at the hearing that existing prohibitions on national origin discrimination adequately address this problem. I stated that the issue of "alienage" or "citizenship" is one wholly without a track record. Opponents of the legislation have established no record of discrimination on the basis of alienage or citizenship. In our view Congress should not legislate unless there is a demonstrated problem and an acceptable, carefully thought out response. In the case of the hypothetical problem of "alienage" or "citizenship" discrimination, there is neither.

Question 14. "The overwhelming fear of discrimination on the part of Hispanics and other ethnic groups" does not justify a provision prohibiting discrimination on the basis of alienage. As I have repeatedly stated, discrimination on the basis of national origin is already prohibited by law; this discrimination is the real basis for the fear of "Hispanic and other ethnic groups," and it is already addressed by existing laws.

Question 15. As I stated in my prepared testimony, and in response to questions at the hearing, there is much to recommend the "sunset" approach of S. 1200, which is to determine, after the immigration reform act is in place, whether there is any discrimination problem to address.

Questions 16-17. These questions reflect an acceptance of my earlier testimony and need no further response.

Alienage/Citizenship Discrimination

Question 18. As I stated in my prepared testimony, 42 U.S.C. 1981 guarantees "all persons * * * the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens." This language would prohibit national origin discrimination by an employer where there is proof that the persons classified by national origin are being denied employment opportunities that the employer makes available to whites. For all the reasons set out in my prepared testimony, including the lack of evidence that there is discernable discrimination on the basis of alienage, we remain convinced that the existing statutes provide the needed protection and there is thus no need at this time for legislation which would prohibit discrimination based on "alienage" or "citizenship."

Question 19. We do not read the Fifth Circuit's Guerra v. Manchester Terminal Corp. decision (498 F.2d 641 (1974)), as that court has subsequently treated the decision, as establishing a remedy under 42 U.S.C. 1981 for discrimination based solely on alienage. In Guerra, an alien filed suit under Title VII and Section 1981, alleging that his employer took action against him based on his status as a Mexican national. The court of appeals' decision regarding Section 1981 primarily addresses the question of whether the statute covers aliens at all. See 498 F.2d at 653-655. The court also suggested that if the discrimination against Guerra was based on citizenship, it is prohibited by Section 1981. See 498 F.2d at 655.

Discussion of Guerra in later decisions of the Fifth Circuit suggest that recognition in Guerra of a cause of action under Section 1981 depended a great deal on the national origin aspect of the case. In Campbell v. Gadsden County Dist. School Board, 534 F.2d 650 (1976), the Fifth Circuit stated (534 F.2d at 654, n.8):

> Our court has construed section 1981 broadly enough to embrace claims regarding employment discrimination on the basis of alienage. Guerra v. Manchester Terminal Corp., 5th Cir. 1974, 498 F.2d 641, 654-55. It should be noted, however, that the discrimination against Mexicans involved there has strong racial overtones. * * * The fact that racial discrimination is an important component in a section 1981 cause of action is also clear from the Supreme Court's recent section 1981 decisions banning discriminatory admission policies in private schools and discrimination against whites in private employment.* * * Section 1981 thus allows relief for a limited range of particularly serious civil rights violations in which racial animus is implicated.

See also Bobo v. ITT Continental Baking Co., 662 F.2d 340, 344 (5th Cir. 1981), in which the Fifth Circuit said, "we have previously characterized Guerra as a broad construction of 1981 in a case with 'strong racial overtones."

Question 20. We see no reason why the federal government should follow state decisions about employment of aliens. The treatment of aliens in this country involves a number of questions affecting international law and policy, which are committed to the federal government to resolve. Decisions regarding the employment of aliens in the federal government may involve quite different considerations from those involving employment by a state or private employer. Regarding the employment of aliens generally, we have said that there is no basis or need now for a federal standard regarding employment of aliens.

Question 21. Regarding the question concerning the preference of a private employer to offer employment only to United States citizens, we would not recommend that that sort of action be prohibited. It is doubtful that such a response would become so widespread that aliens who are entitled to seek employment would be substantially affected. Nor do we see much merit in a process that would penalize employers choosing to hire U.S. citizens.

Questions 22-25. All of these questions appear to presume that the act will result in discrimination on the basis of citizenship, or that there is a present need to create a provision prohibiting discrimination on the basis of citizenship or alienage. We have repeatedly denied that there is such a problem or need. While there may be discrimination on the basis of national origin occurring in this country, there are present prohibitions against that form of discrimination.

Questions 26-27. Regarding the concern about national origin discrimination by employers who employ between four and fourteen employees, I stated in my prepared testimony that although Title VII does not reach those employers, 42 U.S.C. 1981 and most state non-discrimination laws do. Accordingly, we do not think any amendment of Title VII, or creation of a Special Counsel, is necessary to afford adequate coverage of national origin discrimination. If Congress is absolutely convinced that it is necessary to extend the coverage of federal law (other than Section 1981) to all employees covered by this bill, we would suggest that the preferable method is to simply amend Title VII for national origin claims, rather than create a Special Counsel. There would be no basis to amend Title VII for any other type of claim, since this bill would not affect any other type of discrimination. I stated in my prepared testimony a number of reasons why the Special Counsel provision is unnecessary and duplicative and I continue to adhere to that view.

Question 28. The second to last question in this section asks whether there is a "logical nexus" between filing a notice of intent to become a citizen and being protected against discrimination based on citizenship. Our view is that there is no basis at this time to enact legislation prohibiting discrimination based on citizenship or alienage.

Question 29. The last question is based on a premise that the "H-2" program establishes "equality of [employment] opportunity" for citizens and permanent resident aliens. I do not believe the statute which addresses the H-2 program (8 U.S.C. 1101(a)(15)(h)(ii)) in any way establishes any legal standards regarding employment opportunity. That section of the act only defines an alien as one who is coming to this country to perform temporary services, as long as there are no unemployed persons capable of performing the service in this country. The statute has no effect on an employer's nondiscrimination responsibilities. When deciding whether to hire a citizen or lawful resident alien, an employer must obey the nondiscrimination laws of this country.

Antidiscrimination Mechanism

Questions 30-33. I set out in my testimony the basis for the administration's belief that the Special Counsel provisions are duplicative and unnecessary, and may be counterproductive, and it is not necessary to repeat those views here.

Technical Questions

Questions 34-35. The provision in H.R. 3080 regarding the private right of action appears to be a sort of hybrid between the procedures under the National Labor Relations Act and those which exist under Title VII. While NLRB procedures are administrative, at least initially, the Title VII procedures which occur after informal conciliation fails involve court action.

Under Title VII, once a complainant files a charge of discrimination with the EEOC, the EEOC investigates and determines whether the claim appears valid. 42 U.S.C. 2000e-5(b). Once EEOC determines the claim is valid and is unable to conciliate the matter, if the charge is against a private employer the EEOC may sue. If the employer is a state or local government, the EEOC refers the case to the Attorney General. 42 U.S.C. 2000e-5(f)(1). If EEOC or Justice notifies the individual that the government will not file suit, the individual has the right to file his own private action in court within 90 days after receiving that notification. See 42 U.S.C. 2000e-5(f). The individual may also file suit if 180 days has passed since he or she filed a charge with the EEOC, or with a state agency in those states which have local authorities which may take action in employment discrimination cases, and no formal action has been taken either informally (through a conciliation agreement) or in court (by the EEOC or the Attorney General filing a complaint). There is no provision in the NLRA which would allow an individual to file a private case if the NLRB's General Counsel decides not to pursue the case.

Therefore, the procedures in H.R. 3080 seem to take the approach of Title VII, which gives the individual a right to file a private action only after the government determines not to pursue the matter in court itself. Under H.R. 3080, of course, the right granted is a right to file an action with the Administrative law Judge (ALJ), which is where the Special Counsel would file his or her complaint as well. The provision in H.R. 3080 which would allow the individual to be a "full party" in any proceeding filed by the Special Counsel is analogous to provisions in Title VII. Once the EEOC or Attorney General files a complaint on a charge of discrimination, Title VII states that the individual who filed the charge "shall have the right to intervene." 42 U.S.C. 2000e-5(f)(1). Again, the Title VII action is in court, while the H.R. 3080 action is before the ALJ. Under the NLRA, persons may appear as witnesses in cases before the ALJ and are sometimes allowed to question or put on witnesses themselves, see 29 U.S.C. 160(b); but they are not parties for the purpose of independently taking further action not initiated by the NLRB's General Counsel.

One question asks whether ALJs can develop procedures to receive complaints directly from individuals. If the provision is passed, -- and we think it should not be -- each agency in which the ALJs will be located would have to establish appropriate procedures, a task which is fraught with difficulty.

Question 36. Regarding remedies for "unfair immigration-related employment practices," we have stated our opposition to the inclusion in this bill of these provisions. They are simply not necessary at this time. The criticism you relate that the provisions in H.R. 3080 do not go far enough because they prohibit only discrimination in hiring demonstrates, in our view, an intention to broaden the nondiscrimination legislation in the bill for reasons wholly unrelated to this bill. This bill deals with the hiring of undocumented workers. The fear which has been the basis for proposals to include nondiscrimination provisions in this bill is that employers will refuse to hire certain ethnic workers at all rather than risk a violation of the employer sanction provisions of the bill. There is nothing in this bill, or in any opposition to it, which could possibly justify language which would purport to prohibit discrimination in "pay, job assignments, promotions, terminations, etc." This bill deals with hiring, and with nothing else.

Question 37. You also ask whether the penalties for violating the verification requirements and the nondiscrimination requirements should be made uniform. We have already stated that there should be no nondiscrimination procedures. Existing prohibitions in the area of nondiscrimination are sufficient.

Questions 38-39. With regard to the questions regarding state enforcement of state nondiscrimination laws, we understand that these questions have been directed to EEOC as well as to me. I would, therefore, defer on this issue to the EEOC, which has had more direct dealings with state fair employment agencies than this office has had. With regard to your question concerning the "constitutional power" of a state to "outlaw discrimination based on alienage," we see no legal impediment to a state's decision to outlaw discrimination based on alienage by employers within a state, as long as that prohibition would not apply to the federal government, and would not interfere with federal laws or regulations which limit certain positions to citizens. As long as the state's law does not impose burdens upon aliens inconsistent with those the federal government imposes upon them in the exercise of its exclusive authority over immigration and international affairs, or unless the Congress has demonstrated an intent completely to oust the states from a certain area of regulation of aliens, a state law affecting aliens is not pre-empted by federal law. See DeCanas v. Bica, 424 U.S. 351 (1976).

Question 40. You also ask whether an "enforcement mechanism for an unfair immigration-related employment practice" could be incorporated into already existing agencies. Again, we have said that we do not believe any such mechanisms are required as of now. We have pointed out that the EEOC already has jurisdiction over private employers, and the Department of Justice has jurisdiction over public employers, for discrimination based on national origin.

Question 41. You also ask what recourse a U.S. citizen would have under present law or under H.R. 3080 against discrimination on the basis of alienage. No present nondiscrimination law, to my knowledge, prohibits discrimination based on alienage, so a citizen discriminated against solely on the basis of alienage would have no recourse. However, if the discrimination which is ostensibly based on alienage or citizenship is actually based on national origin, Title VII, 42 U.S.C. 1981 and state laws in some cases, would provide recourse.

There is only one circumstance, to our knowledge, which now presents a real possibility of discrimination against United States citizens based on their citizenship. Some foreign-based companies have chosen to limit certain positions to citizens of the company's home country. This practice has, in some cases, been defended based on rights guaranteed by treaties. However, this area of the law is not only complex, but essentially unresolved at this time; we have taken the position in some litigation that even a treaty right does not allow a foreign-based company to use a citizenship requirement as a pretext for discriminatory practices which are intentionally based on national origin. It is doubtful that the sponsors of the language in H.R. 3080 which prohibits discrimination based on citizenship or alienage had this problem in mind; however, including such language in H.R. 3080 could well confuse, unintentionally, legal questions which are now the subject of consideration and litigation.

Question 42. You also ask what effect extending the coverage of Title VII to employers of between four and fourteen employees would have on EEOC's caseload. I will defer to EEOC on this question.

Question 43. You also ask under what circumstances an INS officer would file a discrimination complaint if the Frank amendment becomes law. If that occurs, I assume INS will establish guidelines for its personnel regarding their responsibilities under the Act. It is impossible to say at this time what those guidelines will be except to say that requirements imposed upon INS by law would of course be followed.

Question 44. This question notes that under H.R. 3080 a person whose charge has been dismissed by the Special Counsel can file a claim directly with the ALJ, and you ask whether it would make more sense for the person to have an appeal from the dismissal of the charge. Again, our answer to this question must be viewed against the backdrop of our expressed opposition to the inclusion in this bill of any nondiscrimination provisions and to any creation of a Special Counsel or similar new enforcement agency.

We are not aware of provisions in existing law which allow persons to take issues to an ALJ where the government agency given responsibility for filing cases with the ALJ decides the case has no merit. Under the National Labor Relations Act, once the Regional Counsel decides not to file a case, the individual who filed the charge may ask the General Counsel to review the Regional Counsel's decision. If the General Counsel agrees that no case should be filed, the individual has no further recourse under the NLRA. The General Counsel's decision not to file is final and unreviewable, and fully an exercise of agency discretion.

Question 45. You also ask whether under the bill "orders of the Special Counsel are self-executing." The bill would not endow the Special Counsel with power to issue any orders, but only to file cases with an ALJ. The bill also appears to contemplate that the Special Counsel, once having secured an order from an ALJ, could seek judicial enforcement of the order if the employer against whom the order is entered does not voluntarily comply. Since the act specifically refers to the provisions of the NLRA for purposes of judicial enforcement of orders entered by ALJs under this bill, there does not appear to be any provision authorizing private action to seek judicial enforcement of an order of the ALJ. There is no such provision in the NLRA, because there is no private enforcement allowed under that act. Although the party who filed a charge may take part in administrative proceedings under the NLRA, see 29 U.S.C. 160(b), all decisions about enforcement proceedings are made by the General Counsel of the NLRB, and not by private individuals who may be involved in the case.

Under the NLRA, an "aggrieved" individual may seek review of an order of the NLRB, 29 U.S.C. 160(f), but there is no provision allowing an individual to pursue a case administratively or to seek to "enforce" an order of the Board. If the sponsors of the legislation intended to allow a private individual to seek judicial enforcement of the ALJ's order perhaps the bill should be amended.

Question 46. Your last question on this section concerns language which you state requires a hearing before the ALJ five days after the complaint is filed. The language as we read it requires that a notice that a complaint has been filed and that there will be a hearing must be issued within five days, but it does not appear to require that the hearing itself be held within five days. A requirement that a hearing be held only five days after the filing of a complaint would hardly give anyone time to prepare, and it is doubtful that any ALJ's schedule will be so open or flexible that a hearing can be scheduled on such short notice.

Other Anti-Discrimination Provisions in H.R. 3080

Question 47. If the Frank amendment is retained, it would be appropriate to leave the reporting and monitoring function with the Civil Rights Commission.

STATEMENT OF HONORABLE JOHN CONYERS, JR., MEMBER
UNITED STATES HOUSE OF REPRESENTATIVES
ON BEHALF OF THE CONGRESSIONAL BLACK CAUCUS
BEFORE THE
HOUSE SUBCOMMITTEE ON IMMIGRATION, REFUGEES AND INTERNATIONAL LAW
AND THE
SENATE SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY

OCTOBER 9, 1985

Mr. Chairman and members of the Subcommittees, it is a pleasure to testify before you today on an issue of fundamental importance in the immigration debate, that of discrimination. As you may be aware, the Congressional Black Caucus opposed the Simpson/Mazzoli Immigration Bill during the 98th Congress. We adopted this postion largely because we believed that employer sanctions would result in discrimination against foreign looking people as well as language minority groups. Unfortunately, since both S. 1200 and H.R. 3080 contain similar employer sanction provisions, we must once again record our opposition to this discriminatory and ineffective approach for solving the U.S. immigration problems.

We continue our strong opposition to employer sanctions. Inevitably employer sanctions will lead to discrimination against certain Americans as well as legally authorized non-citizens. Employers, faced with the prospect of civil and criminal penalties, will be reluctant to hire foreign looking people.

Further, employers will fear that federal authorities will more carefully watch them if they hire foreign looking people and language minorties. This is of particular concern in view of the U.S. Supreme Court decision in INS v. Delgado, upholding factory raids and selective questioning of workers based in part on ethnicity and appearance. Moreover, the U.S. Commission on Civil Rights in its publication "The Tarnished Golden Door," suggests that workers most likely to be considered undocumented would almost excusively be Hispanics, Asians and Blacks.

The consequence of this will be that employers will simply refuse to hire foreign looking and foreign sounding people. Those individuals who have no intention of discriminating will resolve any doubts in favor of not hiring those people. Those employers who intend to discriminate will now be given a convenient excuse.

THE VERIFICATION REQUIREMENTS

The verification requirements contained in both S 1200 and H.R. 3080, will only make a bad situation worse. In order to verify whether persons applying for employment are legally in the U.S., employers are required to make arbitrary judgements about the validity of certain documents like social security cards and drivers licenses. Since these documents are easily forged, most employers will simply refuse to hire foreign looking people, resulting massive employment discrimination.

INADEQUACY OF EXISTING ANTI-DISCRIMINATION LAWS

For several reasons Title VII of the Civil Rights Act of 1964 is not an effective deterrent or remedy for employment discrimination which results from employer sanctions. First, Title VII protects only workplaces with 15 or more employees. Second, Title VII does not apply to seasonal employment. Third, alienage is not a protected class, and national origin prohibitions under Title VII do not cover alienage. Fourth, the cuts in funding for the Legal Services Corporation have depleted the supply of available attorneys to assist victims in such cases and thus render the claims unavailable. Fifth, the Supreme Court case of Espinoza v. Farah Manufacturing Co., demonstrates that Title VII is not an effective remedy for non-citizens.

ALTERNATIVES TO EMPLOYER SANCTIONS

There are alternatives to employer sanctions that are more likely to be successful and not lead to discrimination. First, greater emphasis needs to be placed on securing the borders. Congress has to its credit taken some steps toward improving border security. However, greater resourses must be devoted to this effort. The funds necessary to fund the employer sanction provisions would better be used to provide the INS with adequate resources to fully to enforce existing laws rather than to create a system that is not likely to curtail illegal immigration and may well cause significant harm to lawful residents of this country.

Secondly, we must work out cooperative efforts with other countries to develop an international strategy for reducing immigration flows into our country. Finally, we must insure that existing labor laws are strengthened and vigorously enforced.

I would like to thank both Subcommittees for affording the Congressional Black Caucus to testify on this issue.

Statement for the Record

Submitted by

Reverend Nicholas DiMarzio
Executive Director, Migration and Refugee Services

On Behalf of

United States Catholic Conference

Concerning

IMMIGRATION-RELATED EMPLOYMENT DISCRIMINATION

to

U.S. Senate

Subcommittee on Immigration & Refugee Policy

Committee on the Judiciary

October 21, 1985

IMMIGRATION-RELATED EMPLOYMENT DISCRIMINATION

Some members of Congress have expressed surprise that, though "employer sanctions" provisions have been considered as a major feature of immigration reform legislation for more than a decade, concern that such provisions might lead to an increase in discrimination against "foreign-appearing" or "foreign-sounding" persons has only recently coalesced into legislative language to seek added protections for minority groups, especially Hispanics, Asians and "foreign-sounding" blacks, as a corollary to the implementation of "employer sanctions" legislation. This concern that "employer sanctions" may cause an increase in discrimination has lead to the full Senate's acceptance of provisions in S. 1200 the Immigration Reform and Control Act of 1985 to sunset "employer sanctions" should the General Accounting Office ("GAO") report that the provisions have led to immigration-related employment discrimination. In the House bill, H. R. 3080, the Immigration Control and Legalization Amendments Act, this concern has motivated the sponsors to include express provisions to redress discrimination in hiring which may occur because of the enactment of "employer sanctions", and we applaud these refinements.

Before addressing the two approaches taken by the bills, it is necessary to clarify a certain misconception. The belief that the spectre of discrimination has been raised only recently in the context of proposed immigration reform legislation as a delaying tactic, or as a barrier to passage of such legislation, is misfounded.

The United States Catholic Conference ("USCC") has consistently warned of certain inherent dangers in the implementation of "employer sanctions", and has consistently stressed the traditional teaching of the Church on the rights of migrants.

In 1976, in a Resolution on the Pastoral Concern of the Church for the People on the Move, the Catholic bishops of the United States recommended among other things,

> "That the administration and implementation of the immigration laws (of the United States) be reviewed and revised in order to eliminate arbitrary selective enforcement and to reflect humanitarian concerns."

In a 1976 Commentary to the Resolution, the U. S. Bishops called for the amendment of the Civil Rights Act of 1964 to include protections for the foreign born persons in the United States with respect to their alienage. As it stated:

> "The traditions of this country and simple justice make it clear that all persons should be treated equally and that if a person is judged acceptable to be a permanent resident, that should not be a license to discriminate because he or she is foreign born. Therefore, the Civil Rights Act and other legislation out to be amended to protect and provide equal treatment should be guaranteed are...private employment... ."

The Commentary continued to warn against any preventative immigration legislation other than effective enforcement of the wage and hour laws for all workers:

> "The alternative, penalizing employers of undocumented immigrants, would open the door to...discrimination in hiring: persons who look 'foreign' or speak English poorly (or not at all) might not be hired, even though they are citizens or resident aliens, because employers might fear, or pretend to fear, sanctions for hiring an undocumented alien. The United States Commission on Civil Rights has presented the same analysis of the effects of employer sanction legislation to the House Subcommittee on Civil Rights. The Commission stated that proposed legislation 'will have a direct discriminatory effect on minority persons seeking employment, whether they are citizens or aliens authorized to work in the United States'."

Again, for the record, this Resolution and Commentary was issued by the U. S. Catholic Bishops on November 11, 1976.

On April 1, 1982, during the first joint hearings on the Immigration Reform and Control Act of 1982, Bishop Anthony J. Bevilacqua testified on behalf of the USCC, voicing Conference concern

> "...that all laws be applied uniformly by all law enforcement offices and without selectivity or discrimination against any minority group."

After again questioning the necessity of "employer sanctions" provisions, Bishop Bevilacqua emphasized that

> "It is, and has been, the position of the Conference that the greatest protection against such discrimination is to have in place an employment system which will require, as well as enable, the employer to screen every applicant for employment in exactly the same manner."

In Bishop Bevilacqua's most recent testimony on behalf of USCC, presented on September 9, 1985, he stated the following:

> "The position of the USCC on sanctions remains unchanged: we are fundamentally, but constructively, opposed to employers' sanctions because of their potential for increased discrimination against minorities....any proposals must neither impose an unacceptable burden on the employees nor offer the potential for the intended or unintended violation of the civil and labor market rights of minorities."

In concluding on this issue, Bishop Bevilacqua drew the line for USCC, stating that the Conference is

> "...willing to accept sanctions only under the following:
>
> - IF they are an integral part of a generous legalization program;
> - IF they are accompanied by stringent anti-discrimination legislation;
> - IF they envision a secure and uniform national employment identification system required of all applicants; and
> - IF the legislation exempts from the intricacies of the law those employing less than four persons.
>
> We must thus seek substantive reassurances that enforcement will not fall disproportionately on employers employing Hispanics. In other words, since the enforcement price, and the discrimination potential, is likely to be borne so unevenly, any ensuing legislation must offer extraordinary guarantees to allay the legitimate concerns of the affected groups."

Therefore, let the record be clear: while recognizing that the common good of the United States demands immigration reform legislation, the USCC with only great reluctance has stated a willingness to tolerate employer sanctions provisions within the context of a comprehensive immigration reform bill. The sine qua non of this toleration includes provisions to protect against any increase in discrimination in the hiring and employment of foreign-appearing and foreign-sounding persons in the United States, a simultaneously enacted and implemented Legalization program for as sizeable a percentage of the undocumented immigrant group as practicable, a mandatory, secure and uniform national procedure to verify employment eligibility, and exemption of only small employers, those hiring three or less employees, from meeting "employer sanctions" requirements.

The "sunset" provisions to "employer sanctions", as adopted by the Senate during full debate on S. 1200, are a welcomed addition to that piece of legislation. If this legislation, upon enactment, should seriously interfere with the livelihood and pursuit of happiness of a major segment of U. S. society, reason would demand that "employer sanctions" be terminated. Yet, in order to redress the grievances of those who suffer discrimination during the test of "employer sanctions", there should be legislative provisions to give redress to the victims of "employer sanctions"-generated discrimination.

H.R.3080, the Immigration Control and Legalization Amendments Act, incorporates redress provisions which surfaced during the full debate on the immigration bill in the House of Representatives last year. These provisions, known as the "Frank Amendment", in addition to prohibiting certain forms of immigration-related employment discrimination, provide a structure in which aggrieved parties may obtain redress, either through a Special Counsel or by individual action before an Administrative Law Judge. The threat of such actions, if given sufficient public disclosure equivalent to that given "employer sanctions", should prevent some of the unwanted and unintended results of the proposed legislation. If there are to be "employer sanctions" the Executive Branch must mount a concerted program to educate the public as to its duties under the law; the government must also use this opportunity to educate the public as to its duties under the laws prohibiting discrimination in employment, and the penalties which may be imposed for failure to respect these anti-discrimination statutes.

The USCC takes due note of the fact that spokesmen for the current Administration question the necessity of creating a new office to address any increase in discrimination because of "employer sanctions", and the necessity of significantly expanding existing bars against employment discrimination. In a letter to Chairman Strom Thurmond of the Senate Judiciary Committee, dated September 12, 1985, Attorney General Edwin Meese did promise, however, that "(a)ny new pattern of employment discrimination which should arise would be noted ... and will be subject to vigorous enforcement actions under the comprehensive civil rights enforcement scheme currently in existence."

Attorney General Meese did not make reference in the above-cited letter to the fact that the Senate bill S. 1200 did not mandate that employers verify the eligibility to be employed of every individual who is to be hired, recruited or referred for employment. However, in the testimony of Mr. Alan Nelson, Commissioner, Immigration and Naturalization Service, given to the House Subcommittee considering H.R. 3080 on September 9, 1985, the Commissioner declared that the Administration supports the mandatory verification of employment eligibility, but believes that "penalty for failure to keep records is unnecessary." Further, Commissioner Nelson states that "the Administration is opposed to the creation of a national identity card or system" (emphasis added).

The USCC notes that Commissioner Nelson considers the protective provisions in H.R. 3080 as "not needed" to redress "possible and speculative potential employment discrimination...which arguably could occur with the passage of employer sanctions." He continued to state that "If some discrimination of this type should arise ... remedial legislation could then be considered." (Emphasis added).

Prior to Senate debate on S. 1200, the staff of the Judiciary Committee prepared a Staff Report on "Alienage Discrimination in Employment and Anti-Discrimination Agencies." The conclusions of the Staff Report provided a basis of argument against a Frank Amendment approach to the problem: that protective remedies for discrimination on the basis of alienage are available under the "national origins" provision of Title VII of the Civil Rights Act of 1964 ("Title VII") or through a civil rights action under section 1981 of Title 42 of the United States Code ("section 1981"). The USCC has explored the applicability of these two federal statutes to discrimination on the basis of alienage in private employment.

Title VII:

With certain exceptions not relevant here, Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin by private employers with fifteen or more employees. On its face Title VII does not proscribe discrimination on the basis of alienage in private employment, and the Supreme Court so held in Espinoza v. Farah Manufacturing Company, Inc.[1] The Court did note, however, that "certainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."[2] Regulations implementing Title VII promulgated by the Equal Employment Opportunity Commission provide that "where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII."[3]

Title VII does not, however, provide a specific remedy for discrimination in private employment based on alienage. Its utility is limited to situations where citizenship requirements have the purpose or effect of discriminating on the basis of national origin, and then only where the private employer has fifteen or more employees.

Section 1981:

In relevant part section 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...as is enjoyed by white citizens...."[4]

It is clear from the case law that section 1981 affords a federal remedy against discrimination in private employment on the basis of race.[5] It is also clear that the words "all persons" are broad enough to include both citizens and non-citizens (aliens).[6] What is not clear, however, is whether or not 42 U.S.C. 1981 covers private employment discrimination based on alienage as some have concluded.

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[1] 414 U.S. 86 (1973).

[2] Id. at 92.

[3] 29 C.F.R. Section 1606.5(a).

[4] 42 U.S.C. Section 1981. Section 1981 was originally enacted as section 1 of the Civil Rights Act of 1866.

[5] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

[6] Takahashi v. Fish and Game Commission, 334 U.S. 410, 419 (1948).

The Supreme Court has not specifically ruled on the question of whether section 1981 applies to discrimination in private employment based on alienage, and the lower courts are divided on the issue.[7] Opponents of the Frank Amendment rely on a holding in a case decided by the U. S. Court of Appeals for the Fifth Circuit, *Guerra v. Manchester Terminal Corp.*[8], which that court itself has twice since called into question.[9] One treatise simply states: "Courts are split on the application of the section (1981) to discrimination against aliens by private parties."[10]

Until the Supreme Court finally resolves the issue, section 1981 cannot be regarded as a reliable source of protection against discrimination on the basis of alienage in private employment.

One must conclude, therefore, notwithstanding arguments to the contrary, that neither Title VII nor section 1981, either separately or together, provides a reliable source of protection against discrimination based on alienage in private employment.

The USCC does not share the beliefs expressed by Administration spokesmen that there is only "possible and speculative potential" for immigration-related employment discrimination with the implementation of "employer sanctions", and that Title VII and section 1981 are adequate to meet the potential problems. It was discriminatory to pinpoint one nationality group, the Hispanic, in the implementation of "Operation Jobs" in 1982. This program did not concentrate on employers noted for the exploitation of its employees, but rather, on employers of large numbers of Hispanics. The work schedules and therefore, the livelihood, of many United States citizens and lawfully admitted permanent residents who were not able to immediately prove their right to be in the United States were disrupted by this highly selective enforcement program. An equally questionable selective enforcement program called "Operation Cooperation" has been implemented by the Immigration and Naturalization Service for the past three years. It, likewise, has concentrated on employers of minorities. While it has been successful in limiting the number of employment opportunities for the undocumented community, driving these individuals into the hands of "less cooperative" employers who are willing to exploit them for profit, because this program selectively approaches firms which employ "foreign appearing" minorities who are United States citizens or lawfully admitted permanent residents, a disproportionate and undue hardship is wrought upon these minority individuals solely because they "look foreign".

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[7] *See* (1) *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974), *reh denied en banc*, 503 F.2d 567 (1974) (recognizing a cause of action), and (2) *DeMalherbe v. International Union of Elevator Constructors*, 438 F.Supp. 1121 (N.D. Cal. 1977), and *Ben-Yakir v. Gaylinn Associates, Inc.*, 535 F.Supp. 543 (S.D.N.Y. 1982) (denying a cause of action); *see also Espinoza v. Hillwood Square Mut. Assn.*, 522 F.Supp. 559 (E.D. Va. 1981), and *Ortega v. Merit Ins. Co.*, 433 F.Supp. 135 (N.D. Ill. 1977), both of which recognized a cause of action under section 1981 for private discrimination based on alienage in other areas, *i.e.* housing and insurance.

[8] *Id.*

[9] *See Campbell v. Gadsen County District School Board*, 534 F.2d 650, 653-654 n.8 (5th Cir. 1976); *Bobo v. ITT, Continental Baking Company*, 662 F.2d 340, 344 (5th Cir. 1981), *cert. den.* 456 U.S. 933 (1982).

[10] 2 Cook and Sobieski, *Equal Rights Under the Law*, 5-53 (1985).

Until there is a program to grant legalization to long-term, contributing, and otherwise law-abiding members of the U.S. workforce, until there is uniform, secure, and readily verifiable documentation immediately and easily available to prospective employees who are eligible to be employed, and until employers are given adequate instruction as to uniform procedures to determine who it is they can hire without subjecting themselves to the threat of disruptive "job surveys" by the Immigration and Naturalization Service, programs such as "Operation Cooperation" merely continue to cause the concern that "employer sanctions" will lead to an increase in employment discrimination against the "foreign appearing" United States citizen and lawful permanent resident seeking to earn a livelihood.

The United States Catholic Conference respectfully submits that the protections offered by the Frank Amendment incorporated in H.R. 3080 are viable means to prevent an increase in employment discrimination, and meet the Conference requirement that implementation of "employer sanctions" be accompanied by stringent anti-discrimination legislation. This is not to say that the Frank Amendment represents the only manner of legislating acceptable protections. Appropriate amendatory language to the Civil Rights Act of 1964 and authorization of increased funding for the operations of the Equal Employment Opportunities Commission, enacted concurrently with "employer sanctions", may be an acceptable alternative for consideration.

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SAMUEL L. MAURY
Executive Director

November 5, 1985

The Honorable Romano L. Mazzoli
2246 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Mazzoli:

The Business Roundtable's Employment Policy Task Force, chaired by Mr. James Burke, Chief Executive Officer of Johnson & Johnson, and The Business Roundtable have supported, and continue to support, the enactment of immigration reform legislation.

We would appreciate your including in the hearing record the enclosed Roundtable statement in support of the legislation and in opposition to the alienage provision included in this year's legislation.

Thank you.

Sincerely,

Samuel L. Maury
Executive Director

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The Business Roundtable

STATEMENT REGARDING H.R. 3080
The Immigration Control and Legalization Amendments Act of 1985

The Business Roundtable is an organization made up of approximately 200 Chief Executives of large American corporations.

The Business Roundtable has been a consistent supporter of immigration reform. We recognize that something must be done to address a problem that is escalating to an alarming degree. We accept the conclusion reported by Chairman Rodino in 1975:

> "...the adverse impact of illegal aliens was substantial, and warranted legislation to protect U.S. labor and the economy and to assure the orderly entry of immigrants into this country."

Ten years later this difficult and complex issue is still before you and we hope that having come so close to a solution last year, the 99th Congress will succeed in enacting the legislation which will establish control over our nation's borders and alleviate the difficulties faced by what has become a subculture within the United States, illegal aliens.

H.R. 3080 and its companion S. 1200 provide a workable answer through the combination of enhanced border enforcement, employer sanctions and compassionate legalization.

The burden for employers will be onerous and we know both Houses have agonized over an acceptable program. As an employer's organization, we have agreed to accept the employer sanction provision as long as Congress does not place an undue burden upon employers to demonstrate compliance. We see this legislation as a way to help eliminate an underground society of illegal aliens -- now largely beyond the reach and protection of the law. It attacks the incentive for illegal entry -- namely jobs.

Notwithstanding our overall support, we oppose the proposal to establish a new form of discrimination; the so-called alienage provision. This provision would establish the right of a non-citizen to sue an employer for hiring a U.S. citizen over him or her. It is philosophically repugnant and unpragmatic.

By definition alien means "relating, belonging, or owing allegiance to another country or government." One of our problems now is that illegal aliens often compete directly with unemployed minority individuals who are here legally. The alienage provision ignores this. Many of us are the offspring of naturalized citizens who came to this country seeking refuge and opportunity. The achievement of the status of "citizen" by our ancestors was an outstanding accomplishment to be celebrated and treasured. It meant something not only to the individual and his or her family but it provided a valuable resource to this country and its economy. To suggest now that a citizen, naturalized or by birth, cannot expect some better opportunity for a job than an alien goes against our very heritage. Job priority to U.S. citizens of all colors, races, religions or national origins is patently fair.

We also oppose the establishment of a new class of discrimination and a new forum to adjudicate its claims on a practical basis. Under existing federal law, employers are already prohibited from discriminating on the basis of race, color and national origin. Also, under Executive Order 11246, federal contractors are prohibited from discriminating on the basis of race or national origin and must undertake comprehensive affirmative action obligations regarding minorities, women, native Americans, the handicapped and Vietnam era veterans, among others. This provision would add an alienage prohibition to the comprehensive list of civil rights requirements.

In response to concerns that employers will discriminate against Hispanics upon passage of the immigration bill, it should be noted that Title VII of the Civil Rights Act and other statutes already provide remedies against employment discrimination based on national origin and race. It would appear that the only arguable purpose of the alienage provision would be to reverse the Supreme Court's Espinoza decison, and prevent employers who wish to do so from hiring U.S. citizens. This provision would subject an employer to simultaneous investigations and enforcement actions by two different agencies with competing and perhaps conflicting regulations. Further, it fails to provide the defense available to employers under Title VII.

To provide a parallel track of review and enforcement with a new and different government agency is duplicative and punitive to employers. We urge you to drop this provision and to get on with basic reform. Failure to do so will force much of the business community to withdraw its support.

November 1, 1985.

STATEMENT ON DISCRIMINATION
RELATED TO EMPLOYER SANCTIONS

Submitted By:

RAUL YZAGUIRRE, PRESIDENT
NATIONAL COUNCIL OF LA RAZA

Submitted To:

SUBCOMMITTEE ON IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

HON. ROMANO MAZZOLI, CHAIRMAN

October 9, 1985

STATEMENT ON DISCRIMINATION RELATED TO EMPLOYER SANCTIONS AS CONTAINED IN H.R. 3080

BY

RAUL YZAGUIRRE
PRESIDENT
NATIONAL COUNCIL OF LA RAZA

Mr. Chairman, and members of the Subcommitee, on behalf of the National Council of La Raza I wish to submit the following statement on the discriminatory impact of employer sanctions legislation for the record. I do so in my capacity as President of the National Council, which is a private, nonprofit Hispanic organization dedicated to the improvement of the socio-economic status of all Hispanic people in the United States.

I. INTRODUCTION

The Immigration Control and Legalization Amendments Act of 1985 (H.R. 3080) relies on employer sanctions as its central measure to reduce and deter undocumented immigration. As in earlier debates, employer sanctions have raised concerns among Hispanic groups, who oppose them because they are inherently discriminatory (see attachment, National Council of La Raza Issue Brief, "Employer Sanctions and Employment Discrimination," August 1983).

In the past, arguments on the discrimination issue have centered on theoretical considerations, by attempting to predict the ways in which employers were likely to react to the provisions rather than discussing empirical, "real world" evidence of actual employer responses. A growing body of evidence directly links employer sanctions with increased employment discrimination. The National Council urges the Subcommitee and all members of Congress to closely examine this evidence in its consideration of employer sanctions and various systems of redress for those affected by sanctions-related discrimination.

II. THEORETICAL CONSIDERATIONS

A. Employer Responses to Sanctions

Experience in labor markets and employment practices suggests that efforts to monitor and control the hiring process will bring about different types of reactions from different types of employers. It is reasonable to assume that many employers would comply with employer sanctions in completely nondiscriminatory ways. Others, however, are likely to act in ways that would have the effect of job discrimination. For example, those employers who would be inclined to discriminate anyway would be provided a legal pretext for such discrimination. If legislation passes, these employers will be given an affirmative defense against discrimination charges, since they could contend that they had not been satisfied that the applicant was authorized to work.

A second, larger group of employers may discriminate through good faith efforts to comply with sanctions statutes. Employer sanctions would create within applicant pools a subgroup of persons who, on the basis of physical characteristics, language, or other factors, appear to be "foreign" to employers. Some employers seeking to avoid sanctions, as well as those who want to avoid burdensome paperwork, may choose not to hire Hispanics or other "foreign-looking" applicants.

Given the complex, subjective nature of the hiring process, it is unclear how all employers will react to sanctions. However, because of the way the threat of substantial penalties is likely to affect the process -- because it will be much easier to avoid hiring "risky" individuals -- discrimination related to the employer responses outlined above would very likely occur in a considerable number of cases.

B. Uniform Verification Standards

Almost all of the major proponents of employer sanctions have consistently maintained that, in order to avoid discrimination, employers must be required to inspect and record the documents of all persons seeking work. This process -- the

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inspection of work authorization documents for all new hires -- is known as uniform verification. Proponents argue that uniform verification will eliminate the possibility of employers verifying the eligibility only of "foreign-looking" applicants, and thus prevent differential treatment of any applicants during the hiring process.

However, previous legislation has not fully incorporated all of the elements of the uniform verification process. First, under verification provisions of last year's Simpson-Mazzoli bill (S. 529/H.R. 1510), employers would have been required to verify eligibility only for all hires; uniform verification standards would not be required for all applicants, thus allowing employers to "screen out" applicants who appear "foreign."

Second, penalties for violations of uniform recordkeeping provisions were substantially lower than those related to the knowing hire of undocumented aliens. Thus, while the employer who violates uniform verification requirements by checking only "suspect" applicants' documents risks a small fine, he or she avoids much larger employer sanctions fines as well as increased administrative burden -- i.e., incentives to "play it safe" outweigh incentives not to discriminate. Further, convictions and penalties for mere recordkeeping violations would be very unlikely if, as would often be the case with discriminating employers, no undocumented aliens were actually hired.

Theoretically, uniform verification might partially alleviate discrimination. In this respect, H.R. 3080 is better than its Senate counterpart (S. 1200). Neither bill, however, includes all of the key elements of a uniform verification system.

III. EVIDENCE OF EMPLOYMENT DISCRIMINATION RESULTING FROM EMPLOYER SANCTIONS

A growing body of evidence strongly suggests that, when faced with complicated hiring restrictions carrying heavy penalties, employers, especially small businesspersons, are confused about their actual liability. Daniel Leach, former Vice-Chair of the Equal Employment Opportunity Commission (EEOC), has pointed this out in reference to employer sanctions:

> The smaller employer is perhaps where some of the problems in Title VII remain most severe: those that lack the sophistication, don't understand the law, choose not to deal with the law. That's a problem for EEOC as it is. I'm sure it would be a problem and continue to be a problem with any legislation that's proposed in [the employer sanctions] area.[1]

History demonstrates that, due to their confusion and uncertainty, many employers over-react and take overly zealous measures to ensure compliance with immigration laws. For example:

- After Project Jobs, a country-wide sweep operation conducted by the INS in 1982, *Time* magazine reported that employers involved in the over 300 raids were reluctant to rehire even those workers who proved their legal status to INS officers.[2]
- Officials in the Chicago Mayor's Office of Employment and Training reported that in the fall of 1984, amid extensive press coverage of immigration legislation, the Office received a call from an employer who asked that they "not send Hispanics" because he believed employer sanctions had been adopted.[3]

Colleen Logan, a high-level official in the California Department of Industrial Relations, attested before the U.S. Commission on Civil Rights (USCCR) to the relation between this confusion and discrimination. The USCCR reported that:

> As she put it, "I can't say that they did [understand what to screen for], because I really didn't understand it totally." She further testified that the response of some employers was to screen employees on the basis of "the color of their skin or their speech accent."[4]

The criteria by which employers screen applicants can be very damaging to persons who fit immigrant stereotypes. When Texas Businessman J.E. Kastrop, who testified in 1984 before a Texas Congressional committee on an employer sanctions bill, was asked how he determined the immigration status of applicants, he replied:

> We check the records. We check them out. Gentlemen, if you have a fellow come up to your office, and he can't speak English, and he is

> looking for a job, and he doesn't have many credit cards, and he lives with six other guys that are illegal aliens, you don't have to look twice to determine this guy shouldn't be in this country.[5]

Specific examples of this type of discrimination were reported during House consideration of the Simpson-Mazzoli bill last year, as employers began to prepare for the enactment of sanctions legislation. The effects of these employer reactions ranged from differential treatment to denial of employment based on skin color or accent. Some examples included:

- Bernard Brown, Vice President of the Coalition of Apparel Industries, acknowledged that, to prepare for employer sanctions laws, the 600 employers he represented were instructed to ask applicants who were "Latinos or look[ed] like Latinos" for immigration documents.[6]
- Similar employer responses were reported in Utah, where in one case 20-40 suspected individuals were summarily fired by a foreman.[7]
- The director of a California manufacturing plant has confirmed that verification processes led directly to discrimination: "'I hate to say this, but I'm sure there have been a lot of times that I've discriminated against Latinos. Sometimes you just don't have time to wait.... If I have four applicants for a job, I would naturally incline toward the one that's not Latino .... Most employers would rather play it safe ....'" Because of these new screening processes, Hispanics dropped from 75 percent to 50 percent of the company's workforce.[8]
- The Chairman of the Texas Governor's Task Force on Immigration stated in July 1985 that the Task force "heard from a number of individuals in Texas, including some employers, who stated that they would be more likely to discriminate against Hispanics if employer sanctions passed, in order to avoid any possibility that they would be in violation of the law.[9]

Employers in these examples did not act with intent to discriminate. They responded to the threat of penalties by "playing it safe"; in the process, Hispanic job applicants were put at a serious disadvantage, and in many cases were denied employment.

Arguments that imposition of employer sanctions will increase employment discrimination have moved from a theoretical to a factual base. It is already known that some employers will react to sanctions in discriminatory ways. The only question is one of the scope of this discrimination.

IV. POTENTIAL SCOPE OF DISCRIMINATION

The National Council does not argue that employer sanctions would lead all employers to discriminate against all Hispanic applicants. Many employers probably will not discriminate; others would discriminate absent the pretext which sanctions provide. But, as shown above, some will undoubtedly discriminate due to sanctions. How many Hispanics will be "at risk" of sanctions-induced employment discrimination?

Some simple, rough analysis of the Hispanic workforce in the United States provides some guidance in this respect. The total Hispanic workforce comprises just over six million persons. Given the current Hispanic unemployment rate of 10.4 percent, and assuming that only 25 percent of this group are looking for jobs on any given day, it can be estimated that over 150,000 Hispanic workers would come into contact with employer sanctions each day under H.R. 3080. According to some recent estimates, small firms hire up to 1.5 million full- and part-time workers weekly -- roughly 750,000 in states with large Hispanic populations. Thus, as many as 150,000 Hispanic jobseekers potentially will be affected by employer sanctions each week, as they compete for 750,000 available small business jobs.

Proponents of employer sanctions have argued that "90 percent of all employers" will comply with recordkeeping and verification requirements. Assuming for the sake of argument that this estimate is accurate, applying the 90% compliance rate to small employers produces significant figures: some 15,000 Hispanic workers would be competing for 75,000 jobs offered by employers who are most likely to react to sanctions in a discriminatory fashion and who may be violating uniform verification standards. Small businesspersons' demonstrated tendency to "play it safe" while hiring would, under this scenario, jeopardize as many as 15,000 unemployed Hispanic applicants every week.

V. ANTI-DISCRIMINATION PROTECTIONS

Convinced that any employer sanctions statute would inevitably lead to an increase in job discrimination, the National Council strongly supports measures which provide redress for those whose civil rights are violated under new enforcement programs. Legislation recently passed in the Senate has no such system of redress. Here, again, H.R. 3080 represents a substantial improvement over S. 1200. Yet protections provided in H.R. 3080 stop far short of those overwhelmingly adopted by House members last year.

The National Council urges that last year's Frank Amendment, as passed by the House, replace H.R. 3080's current system. Limitation of coverage in H.R. 3080 to "intending citizens" could create a subclass of individuals who, under the legislation, would be legally present in this country and authorized to work but would not have an equal right to employment. In assessing the need for restoration of key original Frank amendment protections, we ask that the Subcommitee consider the following points:

- Lawfully resident aliens are entitled to work. A basic tenet of U.S. immigration policy, upheld continually by the Supreme Court, is that aliens legally admitted into this country have a right to seek and keep employment. Documented evidence shows that employer sanctions will threaten this right.
- The number of aliens "at risk" left uncovered by H.R. 3080 is likely to be large. There are some eight million noncitizens in the country who, if they do not apply for citizenship within months of the bill's enactment, could be legally discriminated against by employers wishing to avoid hire of aliens. Rates of application for citizenship among those immigrant groups potentially hardest hit by sanctions-related discrimination (eg., Hispanics) are traditionally very low.
- Current law does not effectively protect against alienage discrimination. Several different studies and reports have found that Title VII of the Civil Rights Act of 1964 and Sec. 1981 of the Civil Rights Act of 1866 will not provide adequate protection to those who chose to remain noncitizens, those who work for small employers, and those who are seasonally employed. 10

To the extent that sanctions legislation is enacted, the National Council believes that an effective redress system is essential. For the reasons briefly outlined above, we feel that protections provided in H.R. 3080 would be ineffective.

VI. CONCLUSION

The National Council of La Raza opposes employer sanctions, because they would have little effect on the flow of undocumented immigration while seriously jeopardizing many thousands of Hispanics and other "foreign-looking" job applicants. Mounting evidence of sanctions-related discrimination strongly suggests that Congress should explore less onerous, potentially more effective enforcement options, and that any sanctions legislation must contain — at a minimum — those protections provided in the Frank amendment.

ENDNOTES

1 U.S. Commission on Civil Rights, The Tarnished Golden Door, 1983.

2 "Dragnet for Illegal Workers," Time Magazine, May 10, 1982.

3 Letter from Onella Limas-Miller, Senior Coordinator, Chicago Mayor's Office of Employment and Training, Dislocated Worker Program, to Senate Judiciary Committee staff, June, 1985.

4 U.S. Commission on Civil Rights, The Tarnished Golden Door, 1983.

5 Testimony of J.E. "Hank" Kastrop before Texas House of Representatives Committee on Business and Commerce, March 4, 1985.

6 "Some Employers Weed Out Illegal Aliens," The Los Angeles Times, June 19, 1984.

7 Letter from Utah Immigration Project, Catholic Community Services; to Senate Judiciary Committee staff, July, 1985.

8 "Some Employers Weed Out Illegal Aliens," The Los Angeles Times, June 19, 1984.

9 Letter from Charles Foster, Attorney at Law, to Senate Judiciary Committee staff, July 11, 1985.

10 See, for example, Congressional Research Service memorandum to House Judiciary Committee staff, on alienage discrimination, September 1985.

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • TWX: 710-822-9406 AGC WSH

VERNIE G. LINDSTROM, JR., *President* RICHARD E. HALL, *Senior Vice President* DANA HUESTIS, *Vice President*
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September 27, 1985

The Honorable Romano L. Mazzoli
Chairman
Subcommittee on Immigration, Refugees
and International Law
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find copies of the statement of the Associated General Contractors of America on H.R. 3080, "The Immigration Control and Legalization Amendments Act of 1985." We would appreciate it if you would include the statement in the hearing record on H.R. 3080.

Sincerely,

Ingrid A. Voorhees
Associate Director
Congressional Relations

Enclosures

THE FULL SERVICE CONSTRUCTION ASSOCIATION FOR FULL SERVICE MEMBERS

STATEMENT

BY

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

TO

THE HOUSE COMMITTEE ON THE JUDICIARY

ON

H.R. 3080, THE "IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS ACT OF 1985"

AGC is:

- More than 32,000 firms, including 8,400 of America's leading general construction contractors, responsible for the employment of more than 3,400,000 individuals; and
- 110 chapters nationwide.

AGC members complete:

- More than 80% of America's contract construction of commercial buildings, highways, industrial facilities and municipal utilities; and
- More than $100 billion in annual construction volume.

September 27, 1985

The Associated General Contractors of America (AGC) opposes H.R. 3080 and any other immigration reform legislation which similarly seeks to impose civil and criminal sanctions on employers. The bill:

- Fails to acknowledge that the problems surrounding illegal immigration have their source in the federal government's failure or inability to **protect our borders from illegal entry.**

- Advances the mistaken belief that employers are capable of doing what government has failed to do -- **protect our borders from illegal entry.**

- Neglects the adverse consequences that are certain to surface when federal enforcement agents set their sights on the business community -- rather than the source of the problem: **porous borders.**

- Ignores the largest domestic issues that our country has had the courage to address in this century -- civil rights and civil liberties.

As the Heritage Foundation has recently reported, after consulting twenty-two of the nation's leading economists, and thirteen former members of the President's Council of Economic Advisers, employer sanctions will also cause significant economic disruption. For the construction and other industries with high rates of turnover among their employees, the cost of satisfying the paperwork requirements will be tremendous. Since 1982, AGC has consistently pointed out that a construction contractor may well experience a 300% turnover of its on-site personnel during the course of a single project. Contractors need different kinds of craftsmen for different stages of construction. Under H.R. 3080, hiring a carpenter or an operating engineer for only a period of days will mean additional recordkeeping for an indefinite period -- to be determined only through a subsequent regulatory procedure.

In addition to filing reams of paper, employers will find themselves wondering who seems to be sufficiently American looking. Outdoor workers will frequently become suspect, and will not appreciate the bureaucratic burden that will descend on them while the source of the problem -- **porous borders** -- continues to be largely ignored.

The Senate bill authorizes roughly $17 million for the Immigration and Naturalization Service, over the next two years, but authorizes a far greater amount -- $3 billion -- to reimburse the states for the costs of legalization, over the next six years. These figures highlight the inadequacy of the efforts to control our borders, and the tremendous cost of not controlling our borders.

H.R. 3080 also strikes at the heart of the civil rights and civil liberties of employers and employees -- neither of which Congress has a right to diminish, and both of which Congress clearly has the obligation to protect. Congress should **adequately protect our borders** and not delude itself into believing that employer sanctions are some kind of painless alternative. According to the General Accounting Office and the Heritage Foundation, employer sanctions, in any event, would be poor alternatives to effective border patrols.

As it considers immigration reform legislation, Congress should clearly keep in mind the outcry and the ultimate reversal that followed the federal government's ill-advised efforts to impose company vehicle recordkeeping requirements. Congress quickly discovered that it had mandated an enormous and needless burden on millions of employers and employees. Passage of H.R. 3080 would make that recordkeeping requirement pale into insignificance.

In addition to opposing H.R. 3080 for its misplaced emphasis, AGC offers comments on its various sections as follows:

Section 101(a)

Section 101(a) lies at the heart of the effort to shift the blame and responsibility for illegal immigration from the federal government to the private sector. Specific problems would include the following:

- The verification and related recordkeeping requirements are mandatory, leaving absolutely no room for accommodation to the wide, almost infinite variety of circumstances which employers encounter. Under H.R. 3080, an employer cannot even hire a close relative without having to generate new employment records. And as further explained below, the verification and related recordkeeping requirements will also force employers to run considerable and wholly inappropriate risks of criminal liability, based on their "use" of unlawfully issued or false documents, or false attestations.

- What purports to be an affirmative defense to charges that employers have unlawfully hired aliens is at least as porous as the borders themselves. Employers will bear the burden of proof on the highly elusive issue of "good faith," and might also have to prove that documents "reasonably appear[ed] on [their] face to be genuine." If the federal government were to contest documents, employers would at least have to rebut any evidence which the federal government, using its massive technical resources, could readily generate.

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Employers seeking to take advantage of the affirmative defense will also have to run the risks already noted -- the risks of criminal liability for the "use" of unlawfully issued or false documents, or false attestations.

- Mandating that employers make their paperwork available to the Labor Department (as well as the Immigration and Naturalization Service (INS), even though the Labor Department has no role to play in the enforcement of the verification and related paperwork requirements, will only create new opportunities for bureaucrats to harass employers, in an effort to serve unrelated purposes. The Labor Department will have no legitimate uses for the information.

- The civil and criminal penalties for the employment of illegal aliens, and the similar penalties which attend the verification and related paperwork requirements, are the most direct evidence of the effort to shift the blame as well as the responsibility for illegal immigration to the private sector. The criminal penalties go so far as to imply that the private sector is morally culpable for the problems surrounding illegal immigration.

- The provisions on discrimination against applicants for employment will only eliminate whatever margin employers would otherwise have for error in their selection of new employees. If employers exclude too many applicants, then they will be liable for discrimination. If employers do not exclude enough applicants, then they will be liable for hiring illegal aliens. Even the nation's best employers, with aggressive affirmative action programs, and no record of any employment of illegal aliens, will find themselves walking an exceedingly narrow line, facing harsh and possibly even criminal penalties.

- The provisions on discrimination will also extend an odd assortment of the principles that underlie Title VII of the Civil Rights Act of 1964 (Title VII). Employers with four to fourteen employees will have to face rigorous provisions on certain forms of discrimination even though the prevailing political consensus will continue to hold that such small employers should not have to face

Title VII's provisions on race, color, religion or sex. Title VII does not apply to employers with fewer than fifteen employees.

Further, employers which are subject to Title VII will have to guarantee that their seniority systems do not exclude individuals of any one national origin, even if the systems are bona fide, and fall under one of Title VII's affirmative defenses. Employers will also find that immigration legislation has distorted Title VII's other affirmative defenses. The result will be an illogical patchwork of discrimination law.

- The provisions on discrimination will intertwine and confuse purely jurisdictional issues with other issues going to the merits of a complaint of discrimination. As a threshold matter, administrative law judges will have to determine whether employers have violated Title VII. If so, then the judges will be deprived of their subject matter jurisdiction. The judges will have the power to hear only those claims which fall outside Title VII.
- The provisions on discrimination will also provide yet another federal agency with a claim to the authority to interpret Title VII. The potential for conflict in the interpretation of that bedrock civil rights statute will increase accordingly.
- The provisions on discrimination will require employers to distinguish between various aliens -- such as aliens who do and do not intend to become citizens, and aliens who have and have not applied for naturalization. This is wholly unrealistic. Employers simply do not have the capacity to draw these kinds of fine lines. Employers cannot hold lengthy hearings before they make routine employment decisions.
- The provisions on discrimination place no apparent time limit on private actions against employers, other than to require complaining parties to wait 120 days. Having timely filed complaints, individuals can then sit on their rights for an indefinite period. There is no "statute of limitations" on private actions.

Section 102(a)

Section 102(a) will expose employers to a substantial risk of *criminal* liability for no more than satisfying the verification and related recordkeeping requirements, or taking the steps necessary to establish an affirmative defense to a charge of hiring an illegal alien. In either situation, employers will be required to rely upon each new employee's identification documents. Employers will also have to rely upon each new employee's attestation, as to whether he or she is a citizen. Under Section 102(a), employers will face criminal liability for simple negligence in their handling of others' identification documents, and will face the same liability for accepting false attestations from new employees even if the employers have no reason to suspect that the attestations are false. Section 102(a) is overbroad and grossly unfair to employers.

Section 111

Section 111 is the only provision to broach the central question -- whether the federal government will accept or shirk *its* responsibility to protect our borders from illegal entry. It is commendable that Section 111 calls for "an increase in the border patrol and other enforcement activities." It is equally unfortunate, however, that the remainder of the bill proceeds immediately to shift the responsibility for immigration control to the private sector.

Section 112

Section 112 will expose employers to the risk of criminal liability for no more than transporting employees to a job site, or from one job site to another, or for having employees, for legitimate reasons, take company vehicles home at night. This section will insulate the normal practices incident to employment from new criminal penalties for the *harboring* of illegal aliens, but will *not* insulate those same practices from new criminal penalties for *transporting* illegal aliens within the United States. To the contrary Section 112 will impose criminal liability for providing the kind of transportation already described if only two conditions are met: the employer is "reckless," with regard to the employee's status as an illegal alien, and the transportation is "in furtherance of" the employee's violation of law. "Recklessness" may be something that lawyers can identify after the fact of an event, but it certainly is not something which employers can easily see coming. Employers can only know that they will be secondguessed. And the second condition will always be met at least to the extent that employment itself makes it possible for illegal aliens to remain in the United States.

Section 301

Permitting certain low wage employers to import massive numbers of aliens will create hardships for higher wage employers. These aliens will do what most citizens would do -- they will seek their best employment opportunities. They will seek employment at construction sites and other places offering higher wages. The special agricultural program will burden employers outside its boundaries -- not the government which imposed employer sanctions, and then admitted massive numbers of aliens, without developing effective mechanisms for tracking those aliens.

* * *

AGC opposes H.R. 3080 for the same fundamental reasons that it recently opposed the companion bill in the Senate, S. 1200. Neither bill represents an adequate or appropriate response to the central problem: the federal government's failure to **protect our borders from illegal entry**. That failure is also manifest in the daily flow of illegal drugs into the United States. H.R. 3080 wrongly absolves the federal government of all blame or responsibility for illegal immigration, and exacts too high a price of our citizens, in civil rights and civil liberties. AGC urges Congress to control our borders instead of our citizens.

ESTONIAN AID, INC.
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41 Union Square West
P.O. Box 357
Cooper Station
New York, New York 10276

October 3, 1985

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Subcommittee on Immigration, Refugees, and
International Law
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Re: Hearings on October 9, 1985:
Discrimination

STATEMENT OF ERICH PARK, EXECUTIVE DIRECTOR, ESTONIAN AID, INC.

Mr. Chairman and Members of the Subcommittee:

I am the Executive Director of Estonian Aid, Inc., a non-profit corporation in New York. My familiarity with the topics of this hearing originates from thirty-seven years of experience in refugee resettlement and integration work, starting with the operations of the Displaced Persons Act of 1948, and from eight years of work as a New York City Department of Social Services caseworker.

I respectfully submit the following written statement, which I request to be included in the hearing's report.

Unless properly amended, the Bill you are now considering will bring about grave consequences of discrimination against non-Hispanic white Americans.

The overwhelming majority of illegal aliens proposed to be amnestied are Hispanics, Asians, Pacific Islanders, and Blacks. Nobody knows their numbers, but an estimate of at least ten to fifteen million seems reasonable. After the amnesty, they will be joined by additional millions of relatives who are currently not yet here, and by new avalanches of illegal entrants who will swarm into the country in anticipation of subsequent new amnesties.

They all would enjoy special privileges over non-Hispanic white men, because under our Government's "affirmative action" rules employers must give preference in hiring to Blacks, Hispanics, Orientals, natives of the Indian Subcontinent, and to American Indians. The more illegals from these groups you "legalize," and the more new entrants you invite, the more severely will the non-privileged Americans be discriminated against.

The extent of this discrimination should become clear if one realizes that each "legalized illegal," and each other new invitee from among the preferred ethnic and racial groups, may deprive him of two or three chances for landing a job.

To apply the science of probabilities, the exact number of chances for employment to be lost on account of each such "affirmative"-category alien depends on the latter's sex: a male alien, when "legalized," will do away with two chances, a female with three. The way this displacement formula works is as follows: under the Government's affirmative action policies, the "minority" candidate (this is how they call them) gets one chance on account of himself or herself, plus an additional chance on account of being Black, Spanish-surnamed, or Oriental, etc., plus one more additional chance, or preference point, if she is a woman. A married "minority" couple, with their preference points added together, thus eliminates five chances for employment--two by the husband, and three by the wife. Later on, after the "legalized" illegals have brought over their often quite large families and numerous relatives, these additional millions, too, would become beneficiaries of "affirmative action" programs, entitled to preferential treatment in employment and elsewhere. The number of non-Latin and non-Oriental "white" Americans displaced from jobs and education would then grow in almost geometric progression.

The more that "affirmative action" privileges, and the presently sought-for "legalization" of illegal aliens, become known in the Caribbean, and South and West of our borders, the heavier the rush of illegal migrants will grow, and the more ethnic and racial discrimination will we have.

To lessen this danger, I respectfully urge you to amend the Bill, deleting from it the so-called legalization program.

As long as the Government continues its discriminatory "affirmative action" policies, it is too early even to discuss such disastrous plans.

To conclude my remarks on discrimination, I cannot abstain from pointing out a misnomer for the pending immigration debate. The news media likes to call the pending Bill "comprehensive legislation intended to curtail illegal immigration." Actually, it is the opposite. The proposed rewarding of countless millions of immigration law violators will increase, not decrease, future illegal immigration. The proposed token employer sanctions are so insignificant that they will be written off as reasonable business expenses, and the prescribed identification procedures so superficial that they will hardly have any effect whatsoever. To make things even worse, the INS, and its operatives, are subject to so many restrictions, and their rights and powers so limited, that it is practically impossible to effectively administer the law.

On the other hand, should the Congress really want to curtail illegal immigration, and be willing to adopt meaningful sanctions, and a meaningful identification system, mandatory for all employers and employees, the illegals would go home voluntarily.

There would be no noteworthy illegal entries and over-stayed visas in the future, and the INS would then no longer have to "find" them and deport them.

* * *

If this position paper should be found to be "anti--immigration," the answer is, that everything has its limits. There are alternatives to uncontrolled immigration.

The United States cannot accomodate everybody in the world who would like to move here, especially not all those who are being lured by our entitlement and dependency policies. Fortunately, however, this country is not the only place of happiness. It were wrong to think that all those who have voluntarily left their homes and come here made a right choice. Many immigrant families in our crime-infested slums, especially those with children, could have been happier in their native lands.

To take a real humanitarian approach, and not treat immigration problems as a rewarding profession, one should reach out to working with the needy in their home countries rather than attempt to transplant them all onto United States soil. One should nurture their self-sufficiency rather than their dependency.

Although economy-minded, I would gladly support more foreign aid for the countries who supply us with illegal aliens. However, such aid must be geared towards vitalization of the receiving countries' economies, and not for military aid, and not to allow situations like those which have developed in the American Food--Aid programs, often counteracting the real interests of an aided land.

The American Peace Corps was a great idea. That institution has to be continued, but also reformed. We should send out no more English teachers, but agricultural extension specialists and industrial planners. We should show the villagers why their chickens lay no eggs, how a small flock of geese can produce plenty of meat feeding solely on grass, and how one cow could produce more milk than two or three.

We should export and develop know-how on the cooperative movement, and should help to set up producers' and consumers' co-ops. We could help people to organize cooperative dairies, major farm machinery co-ops, selling and buying cooperatives, and even cooperative industrial plants. Instead of constantly expanding our automobile industry, leading the world into more and more senseless burning of oil, and into more and more pollution, traffic accidents, and mobile crime, a part of our economy could be redirected towards the development and production, for the hungry world, of more hand-tools, animal-driven plows, mini-tractors, and the like. Special provisions in our immigration and foreign aid laws should help the developing countries to have some of their own agricultural specialists get additional training in the U.S., and our foreign aid programs should have funds earmarked for the support of vocational agricultural schools in the receiving countries. Also, one should not overlook considerations of more American investment in the Caribbean, and in Central and South American private industry.

NFIB National Federation
of Independent Business
The Guardian of Small Business

SUBMITTED STATEMENT OF

THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: House Subcommittee on Immigration, Refugees, and International Law

Subject: H.R. 3080--Immigration Control and Legalization Amendments Act of 1985

Date: October 23, 1985

Mr. Chairman, on behalf of the more than 500,000 members of NFIB, I want to express our thanks for your leadership and that of the Ranking Member, Mr. Lungren, on this controversial and emotional issue. The small employers of this country thank you for your fine efforts to date and appreciate this opportunity to share with you their thoughts on this most important and pressing subject.

America is a nation of immigrants. Whether seeking refuge from religious, cultural, or political persecution, or hoping to improve their economic condition, countless millions the world over have come to the United States seeking a better life. Therefore, the question facing this Subcommittee and ultimately the entire Congress is not whether we will accept immigrants, for our nation is founded on that premise, but rather how this task is to be accomplished and by what procedures will we allow individuals to enter the United States?

Government Relations and Research Office
600 Maryland S.W., Ste. 700
Washington, D.C. 20024
202/554-9000

Throughout our nation's history, immigration has always been a two-edged sword, bringing new citizens with their enthusiasm and energy to our shores, but also generating suspicion and at times hatred on the part of those Americans already here. This was true for those immigrants arriving at the turn of the century who were "different" from those of Anglo-American background, such as Southern and Eastern Europeans, and most especially for the Chinese and Japanese immigrants to the West Coast. Unfortunately, this experience still holds true for many of our nation's more recent immigrants, especially, from the committee's perspective, those individuals coming into the United States from Central and South America.

An important distinction to keep in mind is that the immigration into the United States throughout the 19th and early 20th century was legal immigration. Individuals from Western, Southern, and Eastern Europe and the Far East came to America by boat and were required to enter only through certain designated ports. Today's immigration across the southwestern border of the United States, whether on foot, by car or truck, by plane or boat, is illegal. It is a flood that threatens to overwhelm the resources of the United States to provide a home for all the people within our borders.

Some would say that even the illegality of this immigration could be overlooked, since many of these people have no hope for a life in their native country, and many are fleeing repression. It is the numbers, though, that give one pause. Last year alone, the Immigration and Naturalization Service (INS) apprehended some 1.2

million Mexicans illegally crossing into the United States. In 1965, this figure was only 55,300. Ninety percent of the INS captures take place along the southern border of the United States.[1] These figures speak more eloquently than words on the nature and depth of the problem.

Additionally, there is the question of how many illegal aliens are currently residing in the United States. Estimates range from a low of two million to a high of twelve million. Generally, 3-6 million is agreed to as a reliable figure of illegals currently living in the United States.

It is not a question of being open and fair to others as some would have you believe, but of being fair to our own citizens. This duty is first and foremost the responsibility of our elected officials here in the Congress. Unrestricted illegal immigration threatens the quality of life that we Americans have built over the years. By quality of life I mean the ability of our society to ensure a clean, healthy environment, adequate drinking water and air, housing, food, jobs, and all other factors associated with civilized life in an advanced industrial nation. Many of our states in the southwest are already experiencing an overload on essential public services due to this massive flow of illegal immigration.

There is general agreement that one repercussion of illegal immigration is job displacement. There is disagreement,though, over the amount of dislocation that occurs, with estimates ranging as high as 65 Americans unemployed for every 100 illegals working currently in the United States.[2]

The Senate last month finished work on its version of immigration reform, S. 1200. The key to success of immigration reform both in that bill and the one before this committee, H.R. 3080, is the implementation of employer sanctions. Through this approach the flood of illegal immigration can be stemmed. The members of NFIB recognize this and are willing to do their fair share. In the past, they have supported the creation of employer sanctions. This position was most recently reaffirmed in a January 1985 Mandate vote on the subject, with members voting 68% to 22% in favor of employer sanctions.

Small employers understand very well that the magnet drawing illegal aliens to the United States is jobs, and one of the most important remedies is to eliminate that incentive. It is the firm belief of our members that employer sanctions will serve that purpose. With adult unemployment currently running at 7.1% and youth unemployment at 17.3%, it is important for Congress to address this issue of job displacement.

That said, in the same breath, let me state that small employers are worried about the procedures they must follow when helping the United States government police illegal immigration through verification of employment eligibility. The members of NFIB support the provisions in both S. 1200 as passed by the Senate and HR 3080 to create an affirmative defense for employers if they comply with the verification procedures in the event that at a later date it is determined they had hired an illegal alien.

More importantly, our members feel that the federal government has a tremendous responsibility in taking an active role in making this verification process as simple as possible. In this manner, its effectiveness would be greatly increased as a preventive measure in discouraging the hiring of illegal immigrants.

With respect to verification of employment eligibility, our members supported, by a margin of 60% to 28%, the implemenation of a telephone verification system and creation of a tamper-proof ID card. Employers know they have to help out, and they want to, but they also need the federal government to make that process as simple and effective as possible, so it does not become burdensome and confusing to implement.

Our members split almost evenly on the issue of whether to increase the number of participants in the guest worker program. We therefore cannot take a position as to creating any new guest worker program, as the Senate did during floor consideration of S. 1200.

Additionally, I would like to express the concern of NFIB members on what they perceive to be a disturbing development in HR 3080. I am referring to that portion of the bill, Sec. 274B, that expands current law to provide remedies for alleged discrimination on the basis of alienage. We can certainly understand the concern of Members who wish to prevent discrimination against those who are in this country legally. In our view, however, these provisions go far beyond what we would deem necessary and proper to manage the situation.

The bill creates a new private right of action for individuals alleging alienage discrimination; this right will apply against all employers with three or more employees. We ask the Subcommittee why it is deemed appropriate to afford these individuals with rights under a different standard than is applied in Title VII cases, which are applicable to businesses with 15 or more employees.

Sec. 274B also could create a situation whereby an employer may have to deny employment to a U.S. citizen in favor of an alien, to avoid being charged with discrimination. Clearly such situations were not intended, yet most small employers will err well on the conservative side. The language will therefore have a counterproductive effect.

We strongly urge the Subcommittee to delete this section of HR 3080 and to support the provisions contained in Sec. 402 of S. 1200 with respect to this question. S. 1200 provides for an annual report by GAO for five years as to whether a pattern of discrimination has resulted from employer sanctions, making recommendations for legislation to correct the situation if necessary. The Attorney General and the Chairs of both the EEOC and Civil Rights Commission, as members of a special task force, must review said report and also make recommendations to the Congress, with Congressional hearings to be held sixty days following receipt of the task force report. In our view, the Senate provisions are a reasonable and constructive approach, keeping in full view the responsibilities the Congress owes to our nation's citizens as well as those who wish to become citizens.

America is still the land of opportunity--if it wasn't, none of us would be sitting here today discussing the problems of illegal immigration. No one here wants to deny to needy and deserving individuals the chance for a better life in the United States. We need to temper that desire, however with the understanding that there are over 200 million Americans whose concerns, needs, and desires must be given primary consideration in this debate.

It is the duty and responsibility of the Congress and the Administration to secure and protect the borders of the United States from invasion. Illegal immigration is a form of invasion.

One of the causes contributing to the decline and fall of the Roman Empire was an inability to assimilate peacefully and in a timely fashion the Germanic tribes pressing and crossing over their northern frontier into their civilization. In the beginning, their numbers were few, and they were invited in, settled peacefully along the borders, and Romanized. Later, as the pull and attraction of the Empire became greater, they came in waves, with little care or regard for Roman ways, customs, language and history. All they knew is they wanted to live in the Empire. The rest, as they say, is history.

We here in the late 20th century are faced with the same problem that faced our Roman ancestors. Do we provide for a peaceful and effective means of allowing a reasonable number of people into the United States each year or do we want to continue to foster, through our inaction and weak wills, the growth and development of a sub-population of illegal aliens who have little or no ties to the laws, culture, language, or history of this nation, thereby weakening America from within.

That is the true nature of this debate, and like all great debates, it is a weighty one, filled with much apprehension and fear as to the outcome. The time for action on this matter has long since come and gone. The Congress must act now. How long can we allow this tide of illegal immigration to continue without ultimately harming our nation?

I know the Subcommittee is looking for answers, and I hope that our nation's small employers have helped in providing some reasonable directions on how to get to where we want to be. The one question that each of us must ask ourselves is whether we have the "fire in the belly" to accomplish this task. For the sake of all Americans, both the living and future generations, we must.

End Notes

[1] Journal of the Institute for Socioeconomic Studies
Vol. X, No. 2 Summer 1985 p.3

[2] National Journal, 6/8/85, p. 1343

0217T

STATEMENT

ON

ALIENAGE DISCRIMINATION -H. R. 3080

IMMIGRATION CONTRAOL AND LEGALIZATION
AMENDMENTS ACT of 1985

U.S. HOUSE OF EEPRESENTATIVES, U.S. CONGRESS

OCTOBER 9, 1985

Members of the Subcommittee on Judiciary, on behalf of the United Farm Workers of American, AFL-CIO, I wish to point out to the Commitee that the present language in the Rodino-Mazzoli Immigration bill will not protect our resident alien constituents from discrimination if this measure is passed.

Title VII specifically exclues those persons who work less than 20 weeks a year. This provision in itself excludes many agricultural workers.

Another proision that leaves 120 days for investigation, would again, because of the seasonal and migratory nature of the workers we represent, would not provide investigations in a timely manner.

We believe that any type of procedure to adjudicate charges and claims of discrimination should be handled expeditiously to prevent a loss of time and travel.

We also firmly believe that a separate judcicial agency, apart and separate from the Immigration Service should be constituted if those persons who are being discriminated, especiall resident aliens are to be afforded justice.

We do not believe that the Immigration Service is capable of doing this. One of our members, Ramiro Davalos, an American Citizen, suffered his death at the hands of an Immigration officer because he could not speak English and refused to be arrested as an alien. The history of the INS is totally identified as one of opression and we have no confidence that their adjudications would be fair and objective.

Dolores Huerta, 1st Vice President
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ALIENAGE DISCRIMINATION IN EMPLOYMENT

Prepared by:
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INTRODUCTION

This report has been prepared in response to the Staff Report on Discrimination in Employment Prepared for the Subcommittee on Immigration and Refugee Policy.[1] The Staff Report summarily concludes:

> Based on the subcommittee staff's investigations, the following broad points may be concluded: 1) there is significant coverage of alienage discrimination under current law; 2) there is very little evidence that alienage discrimination occurs with any frequency, nor is it commonly held that employer sanctions will cause such discrimination to occur; and 3) there is nearly universal opposition among employment discrimination experts to creating a new anti-discrimination agency.[2]

Each of these conclusions is subject to serious dispute. A more precise inquiry into the applicable law reveals that alienage discrimination does not enjoy "significant coverage."

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[1] Staff of the Senate Subcommitte on Immigration and Refugee Policy, 99th Cong., 1st. Session, Report on Alienage Discrimination in Employment and Anti-Discrimination Agencies (1985) [hereinafter referred to as Staff Report].

[2] Staff Report, at 26.

Furthermore, there is a substantial body of evidence to indicate that alienage discrimination is a serious problem today that would be greatly exacerbated by S. 1200. Finally, it is a fundamental exaggeration to characterize previous schemes to remedy alienage discrimination as creating "a new anti-discrimination agency."

At the very least, MALDEF respectfully asks the Subcommittee on Immigration and Refugee Policy to recognize that these issues are complex and worthy of detailed investigation. Senator Simpson has previously indicated that he would hold hearings on alienage discrimination.[3] We ask the Subcommittee to honor that commitment by soliciting the views of scholars, employers, practitioners and others on all sides of these serious and complex issues. Where employment discrimination may result, the stakes are too high to bury the issues in a staff report.

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[3] Ft. Lauderdale News, Dec. 23, 1984, at op. ed. page.

TABLE OF CONTENTS

PAGE

INTRODUCTION-- i, ii

I. Current Law Fails to Redress Alienage Discrimination-- 1

A. Title VII Does not Cover Alienage Discrimination--- 2-9

B. Section 1981 of the Civil Rights Act of 1866 cannot be relied upon to remedy Alienage Discrimination--- 10

1. The courts disagree over whether Alienage Discrimination is covered by Section 1981------- 10-17

2. Even if Section 1981 covers Alienage Discrimination the remedy is procedurally impotent-- 17-19

C. State and Municipal Governments can utilize the political community exception to discriminate against aliens-------------------------------------- 19-21

D. The Federal Government can freely discriminate against aliens-------------------------------------- 21-22

II. S.1200 would exacerbate an already growing Alienage Discrimination problem-------------------------------- 22

A. Alienage Discrimination is a problem that exists today--- 22-27

B. S.1200 would create an Alienage Discrimination Problem--- 27-31

III. Any Immigration Bill Must Contain Adequate Protections Against Alienage Discrimination---------------------- 31

A. The Legislative History of the Simpson-Mazzoli Bill Shows a Consensus that Some Type of Protection is Proper-- 31-34

B. An Alienage Discrimination Remedy must be Accompanied by Adequate Administration Mechanisms-- 34-36

Appendix A

Appendix B

Appendix C

I. CURRENT LAW FAILS TO REDRESS ALIENAGE DISCRIMINATION.

The Staff Report concludes "there is significant coverage of alienage discrimination under current law."[1] Unfortunately, this is not an accurate statement of the law. Persons discriminated against in employment on the grounds of alienage have few or no legal remedies at their disposal. The Supreme Court in *Espinoza v. Farah Manufacturing Co.* has held that Title VII of the Civil Rights Act of 1964 does not cover alienage discrimination[2]. Furthermore, the circuits and scholars are divided as to whether Sec. 1981 of the Civil Rights of 1866 covers alienage discrimination. In the realm of public employment, protections are surprisingly weak. On the state and local level, broad exceptions have cut into the traditional doctrine that alienage discrimination is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment. Finally, executive orders barring aliens from federal employment have been determined to be constitutional.

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[1] Staff Report, at 26.

[2] 414 U.S. 86 (1973).

A. Title VII Does Not Cover Alienage Discrimination

Lawful Mexican American aliens who experience discrimination as a result of the employer sanctions provisions of S.1200 will not be protected by Title VII of the Civil Rights Act of 1964,[3] unless they can prove that they were discriminated against on the basis of their national origin. Section 703(a) of Title VII provides that:

> It shall be an unlawful employment practice for an employer --(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

In Espinoza v. Farah Manufacturing Co.[4] the Supreme Court ruled that this reference to national origin in 703(a) does not embrace alienage discrimination, but rather refers to discrimination based upon one's ancestry or country of heritage.[5]

The Espinoza Court expressly rejected interpretive guidelines of the Equal Employment Opportunity Commission (EEOC) which would allow a lawful immigrant who had been discriminated against on the basis of his non-citizenship to state a cause of action under Title VII.[6] Refusing to accept the proposition that discrimination on the basis of one's alienage is per se a form of discrimination on the basis of one's national origin, the Court ruled that in order to state a cause of action under Title VII an alien must demonstrate that the employer's actions had the purpose or effect of discriminating on the basis of national origin. Such proof was impossible under the facts of Espinoza because the plaintiff--a Mexican American non-citizen-- was refused employment at a company division in which 96 percent of the employees were of Mexican ancestry. Farah Manufacturing Company's citizenship requirement did not have the purpose or effect of discriminating against all Mexican-Americans, but only non-citizen members of this protected class.

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[3] 42 U.S.C. 2000, et. seq.

[4] 414 U.S. 86 (1973).

[5] Espinoza, supra 414 U.S. at 89, citing H.R. 7152, 88th Cong., 1st sess. Sec. 804.

The employer sanctions provisions of S.1200 are more likely to encourage alienage discrimination as well as employment discrimination based upon national origin. Given the predominance of Mexican Americans in many labor pools throughout the Southwest, as well as the high rate of Mexican American employment in many sectors such as agriculture, most employers are unlikely to suddenly cease hiring Mexican Americans altogether. Rather, employers who fear the imposition of sanctions are likely to request documentation from all applicants who appear foreign and to discount as "forged" the proffered identification of legally documented aliens. Many employers may even interpret S.

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[6] 29 C.F.R. Sec. 1606.1(d) (1972), revised.

[illegible]'s proscription against hiring undocumented aliens as a license to refuse to hire any aliens whatsoever. United States citizens of Mexican heritage who are able to show driver's licenses or social security cards upon request may be less likely to be victimized to the same extent as Mexican American aliens lawfully residing in this country.

Given the likelihood of employment discrimination against Mexicans who have legally immigrated to this country, the task appears to be one of casting such treatment in terms of national origin discrimination in order to obtain protection for its victims under Title VII. Yet after the Supreme Court's decision in Espinoza such protection is practically unobtainable. Numerous post-Espinoza courts have dismissed claims of alienage discrimination under Title VII, stating that the plaintiff had failed to allege or demonstrate that the employer's citizenship requirements had the purpose or effect of discriminating on the basis of national origin.[7] No court in the United States has identified an instance in which citizenship requirements actually constituted national origin discrimination within the meaning of §703(a).

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[7] See, e.g., Vicedomini v. Alitalia Airlines, 33 E.P.D. ¶34219 (S.D.N.Y. 1983) (United States citizen of Italian descent failed to state a cause of action under Title VII where employer hired an Italian citizen to fill position of personnel manager); Novak v. World Bank, 20 F.E.P. 1166 (D.D.C. 1979) (employee's claim that bank discriminated against U.S. citizens barred by Espinoza where plaintiff could not demonstrate discrimination against any nationality); Dowling v. United States, 476 F. Supp. 1018 (D. Mass. 1979) (hockey referee failed to state cause of action against NHL and WHL for discriminating against U.S. referees in favor of Canadian citizens which were unable to pinpoint particular nationality discriminated against; Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975) (Title VII does not protect citizen farmworkers who allege that they were displaced by illegal aliens where both classes are members of the same national origin group).

The EEOC has revised its guidelines on national origin discrimination to conform to the Supreme Court's decision in Espinoza. Commission regulations provide that "(i)n those circumstances where citizenship requirements have the purpose or effect of discriminating on the basis of national origin, they are prohibited by Title VII."[8] The EEOC Compliance Manual (CCH §622, ¶3801) offers the following example of an employer's citizenship requirement which has the effect of discriminating against aliens on the basis of their national origin:

> Respondent has a policy which requires that all its employees be U.S. citizens. Charging party (non-citizen Hispanic) applied for and was denied employment due to this policy. Charging party filed a charge alleging that respondent's citizenship requirement discriminated against him due to his national origin (Hispanic). The relevant workforce in the SMSA is 40 percent Hispanic, of which 15 percent are citizens and 25 percent are non-citizens. All of respondent's employees are citizens. Ninety-nine percent are Anglos and one percent are Hispanic. Based on these facts, an inference is raised that respondent's citizenship requirement has the purpose or effect of discriminating against charging party due to his national origin.

Following this example, a court must thus compare the percentage of persons of the charging party's national origin actually employed by the defendant with the percentage of qualified citizen members of the plaintiff's national origin in the labor force for the area. Where the percentage of Mexican American citizens in the labor market exceeds to a statistically relevant degree the percentage of Mexican Americans employed by the defendant, the citizenship requirement in question has the purpose or effect of discriminating against applicants on the basis of their national origin. The defendant is hiring a disproportionately low percentage of Mexican-Americans even after factoring into consideration the allegedly neutral citizenship requirement. Such an analysis is merely the equivalent of proving intentional discrimination through the use of statistical evidence.[9]

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[8] 29 C.F.R. §1606.5(a).

Another manner in which a citizenship requirement may have the purpose or effect of discriminating against non-citizens on the basis of their national origin was discussed by the Supreme Court in its *Espinoza* decision:

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[9] Under the sequence and burden of proof for disparate treatment cases established by the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), a plaintiff may introduce statistical evidence to prove discriminatory motive on the part of the employer. In the above cited example, for instance, a Mexican alien who is otherwise qualified for a position with the employer and yet is not hired has stated a *prima facie* case of national origin discrimination. The burden of persuasion will then shift to the employer to articulate a legitimate, nondiscriminatory reason for his actions--in this case the applicant's non-citizenship. The plaintiff is then able to rebut this explanation by introducing statistical evidence to show that the employer does not hire Mexican Americans to a level anywhere near their degree of presence in the relevant labor market. In this manner the plaintiff has unmasked the citizenship requirement as a pretext for intentional discrimination on the basis of national origin.

> Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin -- for example, by hiring aliens of Anglo Saxon background but refusing to hire those of Mexican or Spanish ancestry.[10]

Where an employer hires non-citizens of one nationality despite a purported across-the-board citizenship requirement he is engaging in purposeful discrimination by treating other non-citizens less favorably on account of their national origin. The EEOC Compliance Manual treats this as a per se instance of disparate treatment in violation of §703(a) of Title VII.[11]

A lawful resident alien who is discriminated against as a result of the employer sanctions provisions of S.1200 will find it extremely difficult to cast his grievance in terms of national origin discrimination in either of the two manners outlined by the EEOC. The first method requires the plaintiff to demonstrate that the employer intended to discriminate on the basis of national origin and simply used the citizenship requirement as a pretext for rejecting the plaintiff's application. Such an argument will normally be unavailable to the plaintiff where the defendant, as in *Espinoza*, employs a large number of members of the plaintiff's national origin group.[12] A high number of Mexican Americans already in the employer's work force will thus shelter the defendant from discrimination charges by a documented Mexican alien.

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[10] 414 U.S. 95.

[11] CCH §662, ¶ 3801. Although the EEOC has indicated that charges of national origin discrimination may be brought under either disparate treatment or disparate impact theory, 29 C.F.R. 1606.1, cases in which documented aliens are discriminated against on the basis of their non-citizenship are likely to involve intentional discrimination. Instances in which an otherwise neutral rule might have a disparate impact on a particular nationality include fluency requirements, speak-English only rules, and height and weight requirements. 29 C.F.R. 1606.6.

As noted in the *Espinoza* decision and the *EEOC Compliance Manual*, an employer who establishes a citizenship requirement and then deviates from this rule for some non-citizens but not for others will be vulnerable to charges of national origin discrimination under Title VII. Yet employers who are fearful of employer sanctions under S. 1200 are unlikely to formalize their anti-alien animus in any written policy which can later be relied on by a charging party. Rather, employers will randomly refuse to hire some documented Mexican aliens because they "look" foreign or are suspected of being undocumented. In the absence of any formal citizenship rule which is unevenly applied, a lawful resident alien who is discriminated against on the basis of non-citizenship is left with the Herculean task of proving national origin discrimination through the use of direct or statistical evidence. Such proof will be practically impossible where the defendant employs a substantial number of Mexican American citizens.

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[12] Just as a Title VII plaintiff may utilize statistics to prove discriminatory motive, a defendant may introduce favorable statistics to rebut the plaintiff's charges of intentional discrimination. Although a favorable percentage of minority employees in the defendant's work force is not by itself

(Footnote Continued)

After Espinoza there is little hope of invoking Title VII to protect against alienage discrimination in the workplace. The lack of any cases which have found citizenship requirements to have the "purpose or effect" of discriminating on the basis of national origin indicates that courts are unwilling to extend any meaningful protection to aliens who are lawfully residing in this country. Even in those rare instances in which alienage discrimination can be equated with national origin discrimination, the practical problems of statistical proof render Title VII an unlikely avenue for relief. Title VII is thus unavailable as a viable remedy to correct the employment discrimination which will result from S. 1200.

(Footnote Continued)
discrimination, it is material evidence that may be taken into account in evaluating the defendant's motivation. See Cross v. U.S. Postal Service, 639 F.2d 409 (8th Cir. 1981).

B. Section 1981 of the Civil Rights Act of 1866 Cannot Be Relied Upon to Remedy Alienage Discrimination.

The Staff Report concludes that "42 U.S.C. 1981 does cover private employment discrimination based on alienage." This statement is both misleading and incomplete. First, the courts disagree over whether alienage discrimination is covered by Section 1981. Second, even if §1981 did clearly cover alienage discrimination, the remedy's procedures make it impotent.

1. The courts disagree over whether alienage discrimination is covered by § 1981.

Documented resident aliens who are discriminated against as a result of S.1200 and are unable to seek redress under Title VII may potentially have recourse under the Civil Rights Act of 1866.[13] Yet because the current law in this area is unclear, the extent to which §1981 will protect against alienage discrimination will vary from jurisdiction to jurisdiction. Unless and until the Supreme Court resolves this area of the law, §1981 will remain an uncertain and untrustworthy guardian of aliens' rights.

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[13] 42 U.S.C. §1981.

The Civil Rights Act of 1866 was enacted pursuant to Congress' power under the Thirteenth Amendment to eliminate the badges and incidents of slavery. Section 1981 provides that:

> *(a)ll persons* within the jurisdiction of the *United States* *shall have the same right* in every state and territory *to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white persons*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (emphasis is added)

Section 1981 does not require any state action as a prerequisite to its invocation: it provides a federal remedy for purely private acts of discrimination.[14] And because the right "to make and enforce contracts" has been interpreted to include the existence, terms and conditions of employment contracts,[15] §1981 has become a potentially powerful remedy against discrimination in private employment. Unlike Title VII, however, §1981 does not by its terms protect against discrimination on the basis of religion, sex, or national origin.[16] The language "as is enjoyed by white citizens," coupled with §1981's relationship to the

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[14] *See* *Tillman v. Wheaton-Haven Recreation Facility*, 410 U.S. 431 (1973); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

[15] *See* *Johnson*, 421 U.S. 454 (§1981 affords a federal remedy against discrimination in private employment on the basis of race); *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974).

[16] *See* *Runyon v. McCrary*, 427 U.S. 160 (1976) (§1981 does not afford a remedy for sexual or religious discrimination); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (§1981 does not protect against national origin discrimination).

Thirteenth Amendment, clearly indicate that The Civil Rights Act of 1866 was intended to protect against private discrimination based upon race.

One Circuit Court of Appeals, however, has allowed a plaintiff to bring a claim of alienage discrimination under §1981. In Guerra v. Manchester Terminal Corp.,[17] an employee brought a discrimination suit under Title VII and §1981 claiming that he had been transferred to a new department as a result of his status as a non-citizen. The Fifth Circuit dismissed the employee's Title VII charge on the grounds that he was unable to demonstrate that the defendant--who employed a large number of Mexican Americans such as the plaintiff--had engaged in national origin discrimination. Nonetheless, the court allowed Guerra to maintain a cause of action under §1981 for alienage discrimination, reasoning that the purpose of including "all persons within the jurisdiction of the United States" within the coverage of §1981 was to protect aliens against discrimination on the basis of their non-citizenship. A few federal district courts have followed this result,[18] and language in one Supreme Court opinion could be construed as supporting the Guerra rationale.[19]

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[17] 498 F.2d 641 (5th Cir. 1974).

In DeMalherbe v. International Elevator Constructions,[20] a Federal District Judge in California expressly rejected the Guerra result and refused to allow a claim of alienage discrimination to proceed under §1981. Judge Renfrew placed great emphasis on the fact that the Civil Rights Act of 1866 as originally enacted only protected "citizens," and that §16 of the Enforcement Act of 1870 modified the language of 1866 to include "all persons." [21] Because the 1870 Act was "a bill to secure all persons the equal protection of the laws" promulgated in accordance with the Fourteenth Amendment,[22] Renfrew argued that the bill granted aliens protection only against state action:

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[18] See Espinoza v. Hillwood Square Mutual Association, 522 F. Supp. 559 (E.D. Va. 1981) (noncitizen denied membership in cooperative housing association alleged viable claim of alienage discrimination under §1981); Ortega v. Merit Insurance Co., 433 F. Supp. 135 (N.D. Ill. 1977) (§1981 may be invoked to remedy discrimination based upon alienage).

[19] In Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) the Supreme Court struck down a California statute barring resident alien Japanese from obtaining commercial fishing licenses. The Court ruled that this statute violated the equal protection clause of the Fourteenth Amendment because California had no rational justification for or special public interest in imposing such a discriminatory burden on aliens. In dictum, the Court noted that regulating the terms and conditions of immigration is an exclusively federal perogative, and that in enacting §1981 Congress had intended to protect all persons against discrimination based upon either race or alienage. Note, however, that Takahashi involved state action and not private alienage discrimination.

[20] 438 F.Supp. 1121 (N.D. Cal. 1977).

[21] §16 of the 1870 Act extended the benefits of the 1866 Act to "all persons," yet ommitted the language of the 1866 Act guaranteeing property rights equivalent to those enjoyed by white citizens. In 1874 Congress authorized codification of federal statutory law, and the two provisions were then combined in 42 U.S.C. §1981, which now grants "all persons" the same contract (Footnote Continued)

> The Senator's (Stewart's) choice of language and of examples of discrimination against aliens which his bill was intended to prohibit indicates that the purpose of the amendments was to prohibit alienage discrimination by the states.[23]

Under the DeMalherbe analysis a citizen is protected against private discrimination under §1981 whereas a resident alien is protected only against discriminatory state action.

Decisions in other district courts reflect the dispute between Guerra and DeMalherbe. The Southern District of New York, in Rios v. Marshall,[24] dismissed plaintiff's alienage discrimination claim which was based largely on the Guerra decision. A year later the same court, in Ben-Yakir v. Gaylinn Associates,[25] explicitly adopted the reasoning of DeMalherbe while curiously failing to discuss Guerra. While other courts have adopted the holding of Guerra on the other hand, they generally note the dispute between that decision and

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(Footnote Continued)
rights, property rights, and right to sue and be parties as is enjoyed by white persons.

[22] Cong. Globe, 41st Cong. 2d Sess. 323 (1870).

[23] DeMalherbe, supra 438 F.Supp. at 1139.

[24] 530 F.Supp. 351 (S.D.N.Y. 1981).

[25] 535 F.Supp. 543 (S.D.N.Y. 1982).

DeMalherbe. [26]

Furthermore, the Fifth Circuit itself has questioned the soundness of its decision in *Guerra*. In *Campbell v. Gadsden County District School Bd.*,[27] the Circuit, in the light of several Supreme Court decisions,[28] limited *Guerra* by stating, "(i)t should be noted, however, that the discrimination against Mexicans involved there has strong *racial* overtones" (emphasis added). In *Bobo v. ITT, Continental Baking Co.*,[29] the Circuit repeated its caution that the *Guerra* decision was "a broad construction of Sec. 1981 in a case with 'strong racial overtones,'" qualifying *Guerra* with the phrase, "(w)hatever vitality it may retain."

The scholars are no more certain than the courts as to the validity of *Guerra*. Schlei and Grossman, in *Employment Discrimination Law*[30] state that "Section 1981 does prohibit discrimination based on alienage." Curiously, however, in a footnote to that passage, Schlei and Grossman understate what

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[26] *See e.g. Espinoza v. Hillwood Square Mut. Assn.*, 522 F. Supp. 559 (E.D. Va. 1961).

[27] 534 F.2d 650 at n.8, 653-4 (5th Cir. 1976).

[28] The two cases most frequently cited in this context are *Runyon v. McCrary*, 427 U.S. 1600 (1976) and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), both of which stress the racial character of rights protected by §1981.

[29] 662 F.2d 340, 344 (5th Cir. 1981).

[30] Schlei, Barbara and Paul Grossman, *Employment Discrimination Law*, (Washington, D.C.: Bureau of National Affairs, 1983), at 675.

DeMalherbe said about alienage discrimination.[31] Also, in another section of the text, Schlei and Grossman, in an apparent reference to *DeMalherbe*, qualify a reference to *Guerra* with the phrase, "if good law." They also note that "Section 1981 might provide protection only to persons who can claim that the nature of the discrimination was based on racial or color characteristics."[32]

Daniel J. Hoffheimer, in his article "Employment Discrimination Against Resident Aliens by Private Employees (sic)," notes that *Guerra* is "open to serious criticism" and "whether *Guerra* will be adopted by the Supreme Court . . . is difficult to anticipate."[33] Other scholars have been less equivocal. Charles F. Abernathy echoes the current doubts of the Fifth Circuit when he writes of *Guerra*, "*Santa Fe Trail* suggests that older cases protecting aliens as such have been superceded."[34] Charles Duryea Smith and Juan Ernesto Mendez predict that "(i)f the Supreme Court settles this dispute, it will likely put its decision in line with its holding in *Espinoza* and determine that Section 1981 does not prohibit private discrimination on the basis of alienage."[35]

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[31] Schlei and Grossman credit *DeMalherbe* with the proposition that "1981 does not necessarily prohibit alienage discrimination by the federal government." Schlei and Grossman 675, n.24. In fact, the decision stands for something much stronger: "The legislative history of the 1870 Act therefore demonstrates that it was not aimed at private discrimination against aliens." 438 F.Supp. at 1140.

[32] Schlei and Grossman, at 325.

[33] Hoffheimer, *Employment Discrimination Against Resident Aliens by Private Employees (sic)*, 35 Labor Law Journal 142, 146 (1964).

[34] Abernathy, *Civil Rights: Cases and Materials*, 292-3, n.(c) (1980).

The point here is not that *Guerra* is necessarily bad law but rather that its conclusions have been the subject of spirited debate in both judicial and academic opinions. In short, to conclude as the Staff Report does that *Guerra* is the law of the land regarding alienage discrimination claims under §1981 is inaccurate.

2. Even if Section 1981 covers alienage discrimination the remedy is procedurally impotent.

Even if the Supreme Court were to accept the *Guerra* decision and mandate a national policy of protecting against private alienage discrimination, there are many problems inherent in §1981 litigation which would make such a remedy practical and unavailable to many victimized aliens.[36] Unlike Title VII,

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[35] Smith and Mendez, *Employer Sanctions and Other Labor Market Restrictions on Alien Employment*, 6 N.C. J. Intern'l and Com. Reg. 19, 26 (1980). Smith served as a legal consultant to the Select Commission on Immigration and Refugee Policy, 1979-1980. Mendez has served on the Alien Rights Law Project Staff of the Washington Lawyers' Committee for Civil Rights Under Law.

[36] If, however, the employee is successful in stating a cause of action under §1981 there are also many advantages to this avenue of relief as compared to Title VII. Any employer is within the coverage of §1981 whereas Title VII does not apply to employers of fifteen or fewer persons. §701(b), 42 U.S.C. 2000e.

(Footnote Continued)

§1981 does not provide an administrative remedy. Whereas a Title VII litigant can (and must) simply file a charge with the EEOC--which then has responsibility for investigating and conciliating the claim--a plaintiff under §1981 must bear the burden and expense of litigating his claim directly in federal district court. Many documented aliens who are discriminated against as a result of S. 1200 will not have the resources, the knowledge, or the experience to take advantage of such a remedy. A second difficulty with §1981 relief is that the plaintiff must bear the stringent burden of proving intentional discrimination on the part of the employer; disparate impact theory is not available under §1981 as it is under Title VII.[37] Finally, the statute of limitations in a §1981 action is not tolled by the filing of a claim with the EEOC;[38] thus a documented alien who files a discrimination claim with the EEOC and is barred by *Espinoza* may be time barred from later filing a suit in federal district court under §1981.

(Footnote Continued)
Secondly, an individual who prevails under §1981 is entitled to both legal and equitable relief, including compensatory and, where appropriate, punitive damages. *Johnson v. Railway Express Agency Inc.*, 421 U.S. 461 (1975). Finally, a §1981 litigant is entitled to a jury trial on any legal claims. *Setser v. Novack*, 638 F2d. 1137, 1140 (8th Cir. 1980).

[37] *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375 (1982).

[38] *Johnson v. Railway Express*, 421 U.S. 454 (1975).

Thus, for reasons of procedural difficulties and uncertainty in the law, §1981 of the Civil Rights Act of 1866 emphatically is not a reliable guardian of the rights of aliens against employment discrimination.

C. State and Municipal Governments Can Utilize the Political Community Exception to Discriminate Against Aliens.

The area of public employment and licensing raises constitutional issues not seen in the private sector. Under the equal protection clause of the Fourteenth Amendment, state and local classifications based on alienage have been traditionally subject to strict scrutiny. Thus, in Graham v. Richardson,[39] a state law withholding welfare benefits from otherwise qualified aliens failed to meet the required showing of a compelling state interest. Similarly, the Supreme Court, in Sugarman v. Dougall,[40] invalidated a New York law barring all aliens from employment in the state civil service. The Court also has invalidated a state citizenship requirement for applicants to the bar in In re

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[39] 403 U.S. 356 (1971).

[40] 413 U.S. 634 (1973).

Griffiths.[41] The Court has also struck down a Puerto Rican law barring aliens from the practice of civil engineering.[42]

In recent years, however, the Supreme Court has retreated significantly from its inclination to invalidate citizenship classifications. In *Foley v. Cornelie*,[43] the Court upheld a New York citizenship requirement for its police forces. The Court declined to apply strict scrutiny to the statute, reasoning that police officers execute public policy and therefore states have a legitimate interest in promulgating occupational requirements. On the similar grounds that teachers in public schools carry out policy, the Court upheld a New York citizenship requirement in *Amback v. Norwick*.[44] Finally, in *Cabell v. Chavez-Salido*,[45] the Court validated a California law mandating that peace officers be U.S. citizens. Here, the court announced the standard that if the statute "falls within the state's power to define its own political community, the Court will keep judicial inquiry to a minimum."

In the most recent application of the *Cabell* standards, *Bernal v. Fainter*,[46] the Court found that notary publics are not essential elements of the political community and, thus, citizenship requirements fail constitutional structures. It is conceptually difficult to follow the Supreme Court's line that divides notary publics from school teachers. Nevertheless, the Court's political exception to subjecting alienage classifications to strict scrutiny is a broad one indeed. A great many state and local officials are part of the political community. Permanent resident aliens find themselves relegated to the subclass of jobs outside the "political community."

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[41] 413 U.S. 717 (1973).

[42] *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976).

[43] 435 U.S. 291 (1978).

[44] 441 U.S. 68 (1979).

[45] 454 U.S. 432 (1982).

[46] 104 S.Ct. 2312 (1984).

D. The Federal Government Can Freely Discriminate Against Aliens.

The law with respect to alienage discrimination by the federal government is at once clear and harsh. In Hampton v. Mow Sun Wong,[47] the Supreme Court invalidated the Civil Service Commission's blanket exclusion of aliens from federal employment. It relied on the fact that the exclusion had not been authorized by the President. After President Ford issued such an authorization, the exclusion of aliens from federal employment was litigated again and the executive order was upheld in Mow Sun Wong v. Hampton.[48] Thus, with very few, narrow exceptions, only U.S. citizens are eligible for competitive civil service posts.

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[47] 426 U.S. 88 (1976).

[48] 435 F.Supp. 37 (N.D.Cal. 1977), aff'd sub. nom. Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980).

Thus, in the final analysis, legally admitted aliens enjoy virtually no protection against discrimination in the workplace. Title VII fails to cover alienage discrimination and the effect or purpose test is for all intents and purposes insurmountable. Furthermore, it is not at all clear that Section 1981 of the Civil Rights Act of 1866 embraces alienage discrimination. The issue is disputed in judicial and academic circles. Aliens enjoy limited equal protection where state and local employment or licensing is at issue, but the political community exception is extremely broad. Finally, the federal government has a free hand to discriminate against non-citizens.

II. S. 1200 Would Exacerbate an Already Growing Alienage Discrimination Problem.

A. Alienage Discrimination is a Problem that Exists Today.

Contrary to the conclusions of the Staff Report, alienage discrimination does exist in America and is likely to increase with the implementation of employer sanctions.

Staff Report concluded that there is "little, if any, legal or academic research on the subject of whether significant alienage discrimination exists in the labor market today." [49] The Staff Report goes on to cite interviews with several State

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[49] Staff Report, supra, at 19.

Employment Service Directors and Scholars who indicated that "no firm data" exists to determine the extent of alienage discrimination. [50]

However, the Staff Report represents neither a balanced nor extensive inquiry into this important subject. The scholars interviewed were unavailable for questions by members of the Immigration Subcommittee. Organizations which have charged that employer sanctions will lead to greater discrimination were never consulted by the subcommittee staff for data, information or experts which could substantiate claims of discriminatory impact. In addition, such organizations were never afforded an opportunity to present their case.

Moreover, when the conference committee to the Simpson-Mazzoli bill debated the issue of alienage discrimination, the bill's sponsors questioned the notion of providing a cause of action against employers who choose to hire citizens over legally and admitted permanent resident aliens. Senator Alan Simpson said, "I don't see why an American employer should not be able to select a U.S. citizen over a citizen of another country who is here as an alien legally."[51] The New York Times reported, "Mr. Mazzoli said that people were being encouraged to 'buy American' and to 'build American' and should be able to 'hire American' without being accused of employment discrimination."[52] Senator Simpson noted that the idea of protecting aliens from discrimination would prove unpopular: "I cannot sell that in Wyoming. Indeed, I can't sell that anywhere."[53] Thus, there is a generalized sentiment that employers should be able to prefer citizens over resident aliens notwithstanding any legal right to work.

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[50] Id. at 20.

[51] New York Times, Sept. 15, 1984, at A8.

In fact, alienage discrimination does present a serious problem which makes it difficult for persons legally admitted to the U.S. to find employment. Our country is founded on the principle that persons should be selected by merit, not by race or status. It should also be noted that permanent resident aliens are required to pay taxes, and young men must register for selective service even if not citizens. In fact, many permanent resident aliens now serve in the Armed Forces, and have fought, and sometimes died, during World War II, and the Korean and Vietnam wars.

In any event, the problem is much more than simply selecting a citizen over legal aliens. In many instances, permanent resident aliens are not even considered for employment.

One example is a permanent resident alien with a law degree from an accredited law school and, was admitted to the D.C. and Florida Bar. He wants to specialize in International Law and is currently pursuing a course of study to get an LL. M. in

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[52] The New York Times, Sept. 28, 1984, at A16.

[53] The New York Times, Sept. 20, 1984, at A23.

International Law. He applied for a position with a major D.C. law firm was extensively interviewed. However, he was eliminated from consideration when a hiring partner discovered the individual was not a citizen.[54] Thus, this legally admitted individual was disqualified simply because he was not a citizen.

Another example is a legally admitted refugee from Ethiopia, subsequently adjusted to permanent resident status. He holds two master degrees, and applied for a federal civil service job which did not require citizenship as a condition of employment. However, officials rejected the individual's application with a letter indicating that while citizenship was not required for the position, the agency's policy was not to consider the applications of permanent resident aliens until all citizen applicants were considered. Thus, the agency never even considered the individual's application.[55]

Nor are currently employed resident aliens safe from job discrimination. Early this year, Webb County, Texas informed three permanent residents aliens employed as street maintenance workers that they had to apply for citizenship or lose their jobs.[56] In California in response to several INS raids in the area, a small construction firm, asked its Hispanic employees for proof of citizenship.[57] One immigration attorney was dismayed by the number of employment doors that were closed to her client, a permanent resident alien with a master's degree from M.I.T.[58] Another attorney reports of a client who was denied employment despite having proof of her permanent resident alien status.[59]

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[54] The case as described from Mr. Gustavo Fuentes himself to Senator Simpson at an Immigration Panel July 9, 1985 ABA Conference.

[55] See Appendix A for the details of this case.

[56] MALDEF successfully represented the workers in Cortes v. Webb County.

It should be noted that alienage discrimination does not always take the form of a clearly stated citizenship requirement. For example, one Illinois firm does not automatically refuse to hire non-citizens. It does, however, require such applicants to have the INS verify their work eligibility before even considering the application.[60] Those applicants not put off immediately by this requirement find INS delays to be their next hurdle. Needless to say, in such situations the job will often be taken by the time the alien verifies his eligibility.

Many practitioners of immigration law believe alienage discrimination is a growing and pervasive problem. Denise Sabagh, Chair of the National Legislative Committee for the American Immigration Lawyers Association notes, "Aliens have a lot harder time finding jobs. Employers are not willing to hire aliens."[61] Immigration law practitioner Martha Saenz-Schroeder adds, "even when people have work permits, they are still discriminated against."[62]

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[57] Facts as related by Vincent Lozano of Mission Hills, California, July 5, 1985.

[58] Facts as related by attorney Denise Sabagh of Metzger, Shadyac and Schwarz of Washington, D.C., July 12, 1985.

[59] Facts as related by Martha Saenz-Schroeder, a solo practitioner of immigration law in Washington, D.C. Saenz-Schroeder feels her client, an Hispanic woman, suffered from both national origin and alienage discrimination.

[60] Facts as related by Chicago employment counselor Onelia Limes-Miller, July 5, 1985. See a copy of the form in Appendix B.

B. S.1200 Would Create an Alienage Discrimination Problem.

Certainly, alienage discrimination is a problem that exists today. What is frightening, however, is how S. 1200's employer sanctions would greatly exacerbate the practice. A provision which penalizes an employer for knowingly hiring an undocumented alien will adversely impact resident aliens.

The Staff Report claims the bill would not foster alienage discrimination because an employer who in good faith complies with the verification procedures enjoys an affirmative defense and is not responsible for the validity of the applicant's documents.[63] This is expected and this reasoning is subject to a variety of objections.

However, this affirmative defense protects employers, who inadvertently hire undocumented aliens. It does not protect the employee who is refused employment because the employer questions a person's documents. Thus, the affirmative defense is only of any use once an employer is prosecuted and defending himself in a courtroom. However, employers will seek to avoid both INS inspection of the workplace as well as court action by simply refusing to hire persons who appear to be undocumented rather than trust the end result of litigation.

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[61] As related on July 12, 1985.

[62] As related on July 12, 1985.

[63] See Staff Report at 21-2.

Attorney Josie Gonzalez who represents employers provides further insights into the alienage discrimination that would result from employer sanctions:

> The employers who do not provide attractive jobs are not the problem. Its the employers that provide medium to higher salaries-- who have a larger pool of applicants and who are the most cautious regarding legal obligations-- who will discriminate against aliens. It will unfairly impact on Mexican Americans striving for upward mobility.[64]

That S. 1200 will foster alienage discrimination becomes all the more clear in the light of several exacerbating factors. The first is that employers, charged with their new enforcement role, will understandingly make errors with respect to their tasks, some will be more grievous than others. For example, upon passage of the House version of Simpson-Mazzoli, some employers summarily discharged resident aliens and Hispanics. Not only did these employers fail to realize that Simpson-Mazzoli required a conference agreement to become law, but they also mistakenly believed the sanctions would have applied to employees already on the payroll.[65]

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[64] As related by Josie Gonzalez of Gonzalez and Harris in Los Angeles, July 12, 1985.

[65] See Los Angeles Times, June 19, 1984, at p. 8.

Thus, employers can be expected to make a range of errors with respect to the documents of job applicants. At the very least, a great many will entertain serious doubts as to the work eligibility of a particular applicant. As related above, an employer will likely resolve these doubts against the applicant in order to preclude the possibility of sanctions. One possible response to this concern would argue that employers can rely on the INS when questions arise. Unfortunately, however, this response raises the second exacerbating factor.

The INS has an atrocious record with respect to efficient and accurate recordkeeping. A few examples will illustrate the pain which INS errors can produce. After a 1982 raid by the INS as part of Operation Jobs, a southern California firm decided to cooperate with the INS in checking the documents of its workers. The INS informed the employer that 12-15 of the employees' green card numbers were not in the files and thus they were not eligible to work. The employees in fact had been permanent resident aliens for some time and only after many delays and much embarrassment on the part of the firm and its employees was their status verified.[66]

Apparently, the times have not changed either. Just this year, an Oregon man was blackballed from employment because the INS had informed area employers that his green card number was not in their records. The man, who has been a permanent resident alien since 1974, wasted an agonizing 3-½ months before the INS finally found its error.[67] Recently, the INS has pressured some Washington, D.C. and northern Virginia firms to release several employees. The employees are asylum applicants who, until their status is finalized, enjoy the right to work, but the INS claims to have no record of this.[68]

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[66] The Immigration Reform and Control Act (H.R. 1510) Before the House Committee on Agriculture, 98th Cong., 1st Sess (1983). Testimony of Antonia Hernandez of MALDEF.

These are not isolated incidents. The Select Commission on Immigration and Refugee Policy recognized the problem of INS recordkeeping: "Since INS can rarely process these requests in less than a week (sometimes the time gap is much greater), many qualified aliens are either losing time on the job or the job itself as employers instead turn to persons who can prove that they are U.S. citizens."[69] The House Committee on Government Operations roundly castigated INS recordkeeping: "[A]liens are forced to wait years for the service to process their papers, if indeed the papers are not lost. The inconvenience and hardship are an ironic disgrace to a country whose reputation for being able to get a job done undoubtedly attracted many of the aliens here in the first place."[70]

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[67] See Appendix C for the details of this case.

[68] Facts as related by Virginia solo practitioner Michael McKenzie, July 15, 1985. McKenzie, who often represents employers, adds that the firms do not appreciate being caught between the INS and their own employees.

[69] Staff Report, Select Commission on Immigration and Refugee Policy, April 1981, at 578.

Thus, it cannot responsibly be said that the bill will not encourage alienage discrimination. Too many employers will put their faith, not in an affirmative defense in the courtroom, but in a far safer and less costly protection--they refused to hire aliens. This factor is multiplied by the inability of employers to understand the subtleties of immigration law and the inability of the INS to keep its records in order.

III. Any Immigration Bill Must Contain Adequate Protections Against Alienage Discrimination.

A. The legislative history of the Simpson-Mazzoli Bill shows a consensus that some type of protection is proper.

The Staff Report notes that prior to Simpson-Mazzoli, there were no legislative attempts to remedy alienage discrimination, perhaps implying that attempts made as amendments to Simpson-Mazzoli were insincere or not heartfelt. However, while alienage discrimination has certainly been a problem notwithstanding immigration reform, such legislation makes the need for an alienage remedy more compelling--even urgent. Employer sanctions require employers to identify a person's immigration status and refuse employment to undocumented aliens. In addition, the possibility of penalties force employers to categorize persons by their immigrant status. Accordingly, it should come as no surprise to anyone that attempts to impose employer sanctions have been accompanied stride for stride by attempts to remedy alienage discrimination.

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[70] House Report No. 96-1459, 96th Cong., 2d Sess. 2 (1980).

What the Staff Report obscures is that the legislative history of Simpson-Mazzoli ultimately reveals a Congressional consensus that any sanctions program must be joined by secure anti-discrimination measures, including an alienage remedy. Certainly, the Senate, on May 17, 1983, rejected the Hart-Levin Amendment containing such measures by a vote of 29-59. From this point onward, however, the principles contained in the amendment gained great support.

A year later, the House twice considered amendments containing alienage remedies. On June 12, 1984 the House defeated by a vote of 166-253 the Hawkins Amendment which would have protected aliens from employment discrimination. While such protections met strong criticism from Rep. Erlenborn in particular, it is extremely important to realize that the Hawkins Amendment failed for reasons unrelated to its discrimination provisions. Rep. Mazzoli, the bill's sponsor, led the opposition to the amendment because it would also have altered the bill's sanctions provisions. Mazzoli, in fact, urged the House to consider anti-discrimination measures:

> So I would ask the House to vote down the Hawkins amendment and then take a very serious look at the amendment of the gentleman from Massachusetts (Mr. Frank) which

> might deal with that phase of discrimination.[71]

The House took Mazzoli's advice when later that day it resoundingly passed the Frank Amendment by a vote of 404-9. The sponsor made it absolutely clear that his amendment was simply the Hawkins Amendment without the sanctions alterations:

> Many Members who agreed with the efforts of the gentleman from California (Mr. Hawkins) to tighten the antidiscrimination provisions of this legislation voted against his amendment because they disagreed with what he did on sanctions. . . . [My amendment] gives those who want to be strongly against the potential of discrimination a chance to vote for Mr. Hawkins' antidiscrimination provision without in any way jeopardizing the sanction scheme.[72]

Thus, the House almost unanimously supported an alienage discrimination remedy. Furthermore, it cannot seriously be said that the House did not fully consider the ramifications of such an action. The arguments against the alienage remedy had been in circulation for nearly a year after the Senate rejected Hart-Levin. More importantly, Rep. Erlenborn, during the debate on both the Hawkins and Frank amendments, made the entire body aware of these arguments.[73]

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[71] 130 Cong. Rec. H5618 (June 12, 1984) (statement of Rep. Mazzoli).

[72] Ibid., H5641 (statement of Mr. Frank).

[73] See his lengthy objections to the antidiscrimination provisions. 130 Cong. Rec. H5621-2,H5643 (June 12, 1984) (statements of Rep. Erlenborn).

Simpson-Mazzoli, of course, died in conference committee. Yet, despite many bitter disagreements, the conferees did ultimately agree by a vote of 15-8 that some form of alienage discrimination remedy must accompany sanctions. Even Sen. Simpson who had led the crusade against Hart-Levin reluctantly joined the conference on this vote.

Therefore, the legislative history of Simpson-Mazzoli, in the final analysis, reveals a consensus of support for at least some type of alienage discrimination remedy. To conclude as the Staff Report does that "there need be no new legislation concerning these subjects" flies in the face of the will of Congress.

B. An Alienage Discrimination Remedy Must Be Accompanied by Adequate Administration Mechanisms.

As indicated above, even if the Supreme Court held alienage discrimination to be within the purview of Section 1981, the remedy would suffer greatly from procedural imperfections. Accordingly, an alienage discrimination claim, like other discrimination claims, must, to be effective, be joined by efficient administrative mechanisms.

The Frank amendment would create an anti-discrimination unit within the Justice Department. The unit would consist of a Special Counsel who would investigate and bring before an immigration law judge claims of alienage and/or national origin discrimination claims.[74] The Staff Report of the Senate Subcommittee on Immigration and Refugee Policy generally objects to these procedures because the Frank amendment would create a new federal agency.[75]

The Frank amendment emphatically would not create a new federal agency. Objections on these grounds are misplaced and apocryphal. The proposal merely authorizes attorneys from the Department of Justice to investigate claims of alienage and/or national origin discrimination and present them before an immigration law judge. The amendment contemplates nothing on the order of the EEOC with its elaborate, hierarchical and bureaucratic structures including supervisory commissions. David Carliner of the American Bar Association's coordinating committee has written of the Frank Amendment: "No 'new bureaucracy' would have been established; it was a question of which of the existing bureaucracies would have been given the responsibilities."[76]

There are at least two compelling reasons for granting adjudiciary authority to the immigration judge. First, national origin and alienage discrimination impact severely on migrant workers. The temporal nature of their jobs demands that justice be dispensed quickly lest it have no meaning whatsoever.

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[74] The 1983-84 Simpson-Mazzoli bill would have created a new U.S. Immigration Board. Such a board is not included in the new Simpson bill. It is acticipated that claims would be adjudicated by a Immigration Law Judge.

[75] See Section 2b, pp. 13-18.

[76] Washington Post, Sept. 29, 1984, at A17.

Second, under S. 1200's legalization program, the public charge provision is not waivable for those applying for permanent resident alien status. In other words, anyone filing for permanent status as a second step of legalization must not be a public charge lest he or she be subject to deportation. Any aliens in the process of legalizing who were fired or not hired because of alienage or national origin discrimination could find themselves in this situation. They too, at the risk of deportation, would need quick adjudication of their claims. In neither of these situations would an EEOC-like structure which leaves adjudication to the federal courts proceed rapidly enough for charging parties. Thus, it is entirely proper to grant the USIB adjudicatory authority.

APPENDIX A

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

18 March 1985

FEDERAL EMPLOYMENT OF NON-CITIZENS

Arlington, Virginia 22206

Dear Mr.

Your interest in employment with the Federal Election Commission is greatly appreciated and it is regretted that your application is being returned without action.

While there are no citizenship requirements for positions in the Excepted Service, there has always been a highly qualified supply of United States citizens for each position vacancy and, since none of our positions fall within the "shortage supply" category, it is our policy to restrict employment consideration to United States citizens.

Since your application shows that you are not a citizen of the United States and in view of our established administrative policy, your application is being returned for your future use.

Sincerely,

David Orr
Director of Personnel and LMR

Encl
SF 171

APPENDIX B

ORECON LEGAL SERVICES CORPORATION
PENDLETON REGIONAL OFFICE
365 S.E. THIRD
POST OFFICE BOX 1327
PENDLETON, OREGON 97801
TELEPHONE (503) 276-[illegible]

March 14, 1985

Ed Tuddenham
MLAP
2001 "S" Street, N.W., Suite 310
Washington, D.C. 20009

RE: EMPLOYER SANCTIONS

Dear Ed:

In October, 1984, Mr. Salvador Salinas came to our office seeking help. Mr. Salinas had applied for employment at a local food processing plant. The plant told him that they would need proof of citizenship or employment authorization. Mr. Salinas, who has been a permanent resident of the United States since 1974, showed them his "green card" (form I-151). The personnel manager later informed him that he could not be employed because, upon checking with INS in Portland, the plant had been informed that Mr. Salinas's number was not on the INS computer.

Mr. Salinas also called INS for verification, and was told the same thing. He then came to our office for assistance.

I filed a form G-641, "Application for Verification of Information from Immigration and Naturalization Service Records" on November 13, 1984. On January 9, 1985, I checked with INS by telephone to determine the progress made in the search. I was informed that absolutely nothing had been done on the request. Twenty days later, I was informed that the request had been sent to another office, but no response had been received. I made several subsequent phone calls at one week to ten day intervals. Finally, on February 19, 1985, I was informed that Mr. Salinas's status had been confirmed and was on the INS computer. However, I did not receive the completed G-641 until February 25, 1985. The form confirmed that Mr. Salinas's green card had been valid all along. This process took a total of approximately three and one-half months.

During the entire three and one-half month period, Mr. Salinas remained without employment. He made several applications for employment at local employers but due to INS activity in discouraging employers from hiring anyone who was not approved by INS for employment, he was unable to find a job.

It is clear that this is a perfect example of what may happen if employer sanctions are passed by Congress. I am enclosing a copy of a legislative retainer form completed by Mr. Salinas with the hopes that you will forward this information and history on to anyone interested in such proposed legislation. If I can be of any further assistance with regard to this matter, please do no hesitate to call me.

Sincerely,

OREGON LEGAL SERVICES CORPORATION
PENDLETON REGIONAL OFFICE

Peter Fels
Attorney at Law

PF/pm
Enclosure
cc: Chip Wheeler
Anita Paulsen

APPENDIX C

Regional Office ______

Attorney ______

Eligibility Verified ______ in file

CLIENT RETAINER FOR LEGISLATIVE REPRESENTATION

I, SALVADOR SALINAS, retain Oregon Legal Services Corporation, to represent me before the Oregon State Legislature and other relevant public bodies. I request that you do the following:

✓ Testify
✓ Draft legislation, amendments and implement regulations
✓ Review measures
✓ Make representations to legislators and officials and other interested persons
___ Other: ______

Concerning: laws relating to immigration and employment

My interest in this legislation or administrative matter is: prevent happening to others what happened to me (continue on back if necessary).

I give permission to Oregon Legal Services Corporation to disclose my name and the facts of my case while representing my interests.

I agree to cooperate fully with OLS in helping to prepare my case. That includes notifying OLS of any change of address or telephone number. I understand that if I fail to cooperate or to say in contact with my attorney(s) that OLS may withdraw from representing me.

I understand that I will not have to pay for legal services performed by OLS since I qualify for free legal assistance based on my income. I agree to notify OLS if my financial circumstances improve significantly and I realize that if they do I may no longer be eligible for free legal services and that OLS may refer my case to a private attorney.

Because of possible legal restrictions and limited resources, I understand that Oregon Legal Services Corporation may not be able to assist me or may be able to offer only limited assistance.

I understand that if I have a complaint about the manner or quality of service I receive I may file a grievance under the OLS grievance procedure and that I can obtain more information about this on request from the attorney representing me and from the Regional Director in the OLS office in my area.

☐ I am a citizen of the United States.

Dated: 3/1/85

Signature: ______

Address: 1205 W Highland # E-8
Hermiston OR

Phone: 567-8508

Return to: Anita Pauleen
Oregon Legal Services Corp.
2328 NW Everett
Portland, OR 97214

Approved:
Date:

Appendix C

DOUGLAS
FURNITURE
CORPORATION

[illegible] P.O. Box 97
[illegible] Bedford Park, IL 60499
) 456-1505

DATE: ____________________

U.S. Department of Justice
Immigration & Naturalization Service
ration Cooperation Program, Room 338
South Dearborn Street
Chicago, Illinois 60604

Dear Sir:

The following individual has applied for employment at Douglas Furniture Corporation. This applicant states he/she is not a United States citizen and has submitted the following document:

FULL NAME: ______________________________

ALIEN REG. NUMBER: ______ ______________

DATE OF BIRTH: _____ _________________

I have obtained the applicant's approval to verify this information in order to determine his/her authorization for employment.

Sincerely,
DOUGLAS FURNITURE CORPORATION

Ann Sieben
Personnel Director

I authorize the Immigration and Naturalization Service to verify my immigrant status, as requested by Douglas Furniture Corporation.

DATE: ______________ SIGNATURE: ____________________

FOR USE BY I.N.S.

☐ EMPLOYMENT AUTHORIZED
EMPLOYMENT NOT AUTHORIZED
☐ OTHER ______________________________